In the

# United States Court of Appeals

## For the Seventh Circuit

**No. 11641**

NATIONAL LABOR RELATIONS BOARD, ON THE RELATION OF KOHLER CO.,

*Applicant-Appellee,*

*vs.*

JOHN GUNACA,

*Respondent-Appellant.*

Appeal from the United States District Court for the Eastern District of Wisconsin.

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1 DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Wisconsin.

United States of America,
Eastern District of Wisconsin. } ss:

At a stated term of the District Court of the United States of America, for the Eastern District of Wisconsin, begun and held at the City of Milwaukee, in said district, on the second Monday (being the 10th day) of January, A. D. 1955.

Present, the Honorable K. P. Grubb, U. S. District Judge, presiding:

Among other the following proceedings were had, to-wit:

National Labor Relations Board,
on Relation of Kohler Co.,
*Applicant.*
*vs.*
John Gunaca,
*Respondent.*
} Civil Action No. 55-C-265.

Be it remembered that heretofore, to-wit: on the 19th day of September, A. D. 1955, came the Applicant and filed its application for order requiring obedience to subpoena ad testificandum, as follows:

1½ IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Wisconsin.

| | |
|---|---|
| National Labor Relations Board, on Relation of Kohler Co., *Applicant*, *vs.* John Gunaca, *Respondent*. | Civil No. 55-C-265. |

## ORDER TO SHOW CAUSE.

(Filed Sept. 19, 1955. Dale E. Ihlenfeldt, Clerk.)

The National Labor Relations Board, hereinafter called the Board, by its General Counsel, and by Marcel Mallet-Prevost, its Assistant General Counsel, having filed its application for an order requiring Respondent John Gunaca, to obey and comply with a certain subpoena ad testificandum duly and properly served upon said respondent as set forth in said Application, and good cause appearing therefor, it is hereby

Ordered that Respondent John Gunaca appear and show cause, if any there be, at the United States Courthouse and Post Office Building, City of Milwaukee, State of Wisconsin, on the 3rd day of October, 1955, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order of this Court should not issue directing said Respondent to appear before a duly designated Trial Examiner of the Board, at such time and place as the Trial Examiner may determine, and there give testimony and answer any and all questions relative and material to the matters under investigation and in question in connection with the proceeding now pending before said Board pursuant to Section 10 of the National Labor Relations Act, as amended (29 U. S. C. 160), and it is,

Further Ordered, that service upon the respondent of a copy of the Order to Show Cause and of the Application upon which it is issued, be made on or before the 23rd day of September, 1955, and that said respondent shall
2 file and serve his answer to the Application not later than September 28, 1955. Service of a copy of this

Order, the Application, and respondent's answer, in any manner provided for by the Rules of Civil Procedure for District Courts of the United States, or by registered mail, shall be deemed good and sufficient service.

/s/ Robert E. Tehan,
*United States District Judge.*

Dated, Milwaukee, Wisconsin, this 19th day of September, 1955.

3 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-265) * *

## APPLICATION FOR ORDER REQUIRING OBEDIENCE TO SUBPOENA AD TESTIFICANDUM.

The National Labor Relations Board, hereinafter referred to as the Board, an administrative agency in the Executive Department of the Federal Government created pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, et seq.), hereinafter referred to as the Act, by its General Counsel, and by Marcel Mallet-Prevost, its Assistant General Counsel, on relation of Kohler Co., a Delaware corporation and the respondent in Board unfair labor practice proceedings described hereafter, respectfully applies to this Honorable Court, pursuant to Section 11(2) of the Act, for an order requiring respondent John Gunaca to obey a certain subpoena ad testificandum, issued by the Board and duly served upon him in the manner provided by law. In support of said application, upon information and belief, the Board respectfully shows as follows:

1. This Court has jurisdiction of the subject matter of the proceeding, and of the person of the respondent, by virtue of Section 11(2) of the Act, in that the inquiry in aid of which the subpoena was issued is being carried on within this judicial district.

2. Pursuant to the provisions of Section 6 of the Act, the Board has issued Rules and Regulations (Series 6, effective June 3, 1952, hereinafter referred to as the "Rules"), governing the conduct of its operations, which Rules and Regulations have been duly published in the Federal Register, (17 F. R. 4982), as provided for in the Administrative Procedure Act (5 U. S. C. 1002), and are

codified in Title 29 of the Code of Federal Regulations. This Court may take judicial notice of the said Rules and Regulations by virtue of 44 U. S. C. 307.

4 3. Pursuant to the provisions of Section 10(b) of the Act, there is now pending before the Board an unfair labor practice proceeding entitled "In the Matter of Kohler Co. and Local 833, UAW, CIO, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America," Case No. 13-CA-1780, wherein there has been filed and served a charge and a complaint, a notice of hearing has issued, an answer has been filed, and a hearing is in progress, all in the manner and form required by law and by Sections 102.9, 102.10, 102.15, 102.20, 102.34 and 102.35 of the Board's Rules. Said proceeding involves charges that relator Company has discriminatorily discharged and denied reinstatement to certain of its employees in violation of Section 8(a)(3) and (1) of the Act, and that relator has refused to bargain with the representative of its employees, in violation of Section 8(a)(5) and (1). Relator has interposed among its defenses in the proceeding that the employees and their representative engaged in violence and other misconduct which privileged its actions and absolved it of liability.

4. In relation to the proceeding described in paragraph 3, above, the Board did cause to be issued, on August 5, 1955, at the written request of the relator, a subpoena ad testificandum, directed to respondent John Gunaca, requiring said respondent to appear and testify at a hearing before a Trial Examiner of the Board to be held on August 18, 1955, at 9:30 o'clock in the forenoon in the Circuit Court room, County Court House, Sheboygan, Wisconsin, all in the manner and form provided for in Section 11(1) of the Act and Section 102.31(a) of the Rules. Said subpoena was duly served upon respondent by personal service upon him thereof, and the required witness fee and mileage tendered him, all in the manner provided for by Section 11(4) of the Act and Sections 102.80 and 102.32 of the Rules. Copies of the subpoena and return of service thereof are attached hereto marked exhibits A and B respectively.

5. Pursuant to Section 11(1) of the Act and Section 102.31(b) of the Rules, said respondent John Gunaca did, on August 18, 1955, appear specially by his attorneys and filed with George A. Downing, the Trial Examiner desig-

nated by the Board to hear the case, a petition to re-
5 voke the subpoena, on certain grounds therein set forth, which petition, after hearing, was denied by the Trial Examiner. Copies of the motion to revoke the subpoena and the pertinent portions of the transcript of the hearing before the Trial Examiner are annexed hereto marked exhibits C and D respectively.

6. Respondent Gunaca has since failed and refused to appear and give testimony in obedience to the aforesaid subpoena, notwithstanding the Trial Examiner's Determination, based on representations made by relator's counsel, that the testimony sought to be elicited from respondent "is or may be relevant to the issues." Upon information and belief, on August 19, 1955, Kohler Co., by its attorney, Lyman C. Conger, telegraphed Gunaca's attorney, D. Charles Marston, asking him to advise Kohler Co. whether Gunaca would honor the subpoena. No reply was received. On August 31, 1955, Kohler Co., by its attorney, Lyman C. Conger, requested the Regional Director of the Board for the Thirteenth Region to institute judicial proceedings for the enforcement of said subpoena.

7. The refusal of respondent John Gunaca to give testimony in obedience to the subpoena ad testificandum, which testimony is relevant and material to the issues in the proceedings before the Board, constitutes contumacious conduct within the meaning of Section 11(2) of the Act.

Wherefore, the Board respectfully prays:

(a) that an order to show cause issue forthwith directing the respondent, John Gunaca, to appear before this Court on a day certain to be fixed in said order, and that he show cause, if any there be, why an order should not issue directing him to appear before George A. Downing, the Trial Examiner designated by the Board in Case No. 13-CA-1780 pending before said Board, at such time and place as said Trial Examiner may designate and there give testimony and answer any and all questions relevant and material to the matters under investigation and in question in said proceedings before the Board;

(b) that upon the return of said order to show cause, an order issue out of this Court requiring the respondent, John Gunaca, to appear before the said Trial Examiner,
George A. Downing, at a time and place to be fixed
6 by said Trial Examiner, and there give testimony and answer any and all questions relevant and material to the matters under investigation and in question in said proceedings before the Board; and

(c) that the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated, Washington, D. C., this 15th day of September, 1955.

National Labor Relations Board,
By T. C. Kammholz,
*General Counsel,*

/s/ Marcel Mallet-Prevost,
*Assistant General Counsel,*
National Labor Relations Board,
Washington 25, D. C.

7 "Exhibit A."

UNITED STATES OF AMERICA.

NATIONAL LABOR RELATIONS BOARD.

To John Gunaco or John Gunaca

Request therefor having been duly made by Lyman C. Conger whose address is Kohler Co. Kohler, Wisconsin, you are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Circuit Court Room, County Court House, in the City of Sheboygan, Wisconsin on the 18th day of August, 1955, at 9:30 o'clock a. m. of that day, to testify in the Matter of Kohler, Co., Respondent, and Local 833, UAW-CIO, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Charging Party, No. 13-CA-1780.

A-78261

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Washington, D. C. this 5th day of August, 1955.

(Seal) .....

8 "Exhibit B."

Return of Service.

I hereby certify that being a person over 18 years of age, I duly served a copy of the within subpena

X in person
by registered mail
by telegraph
by leaving copy at principal office or place of business, to-wit:

(Indicate by check X method used.)

.....
.....
.....
.....
.....

on the person named herein on August 12, 1955 at 9:00 P. M.

/s/ George M. Harrison
(Name of person making service.)

.....
(Official Title, if any)

I certify that the person named herein was in attendance as a witness at ..... on .....

.....
(Name of person certifying)

.....
(Official Title)

9 "Exhibit C."

UNITED STATES OF AMERICA.

NATIONAL LABOR RELATIONS BOARD.

| | |
|---|---|
| In the Matter of National Labor Relations Board *vs.* John Gunaca. | No. 13 CA 1780 |

PETITION.

Now Comes John Gunaca and appears specially and petitions as follows:

1. That on the 12th day of August, 1955, in the City of Detroit, County of Wayne and State of Michigan your petitioner had placed before him by a person identifying himself as one George M. Harrison a writing purporting to set out the following:

"Subpena

"United States of America

"National Labor Relations Board.

"To John Gunaco or John Gunaca

"Request therefor having been duly made by Lyman C. Conger whose address is Kohler Co., Kohler, Wisconsin, you are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Circuit Court Room, County Court House, in the City of Sheboygan, Wisconsin on the 18th day of August, 1955, at 9:30 o'clock a. m. of that day, to testify in the Matter of Kohler Co., Respondent, and Local 833, UAW-CIO, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Charging Party, No. 13-CA-1780.

"In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has here-

unto set his hand at Washington, D. C., this 5th day of August, 1955.

"A—78261 (Seal)
"(Signed) Abe Murdock
"Notice to Witness:—Witness fees for attendance, subsistence, and mileage, under this subpena are payable by the party at whose request the witness is subpenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpena with the voucher when claiming reimbursement."

10 2. That on the 17th day of September, 1954 a request by the Governor of Wisconsin for the extradition of your petitioner from the State of Michigan to the State of Wisconsin was made upon the Governor of the State of Michigan.

3. That on or about the 29th day of September, 1954, your petitioner was arrested, removed from the county of his residence, and taken to the City of Pontiac before the Honorable Frank L. Doty, Circuit Judge in and for the County of Oakland, State of Michigan, there to answer to a fugitive warrant.

4. That your petitioner did then and there answer to said warrant and was then and there required to make bail and did make bail in the amount of $1,500.00 with two sureties. One of the conditions of said bail required the continuation of the person of the petitioner within the State of Michigan and within the custody of his sureties.

5. That your petitioner did request, and was granted, hearing before the office of the Governor of the State of Michigan at which time your petitioner did request the withholding of the issuance of the Governor's warrant pending the determination of the labor dispute existing between the Kohler Company and Local 833, UAW-CIO, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, which Union represents the majority of the workers of the Kohler Company; your petitioner did seek the withholding of the issuance of the warrant on the ground that your petitioner did feel that he would not, and could not, be granted a fair and impartial hearing as a stranger in an area inflamed by the malicious and wilful incitation of the people by the Kohler Company management which has spent large sums of money of its stockholders in a reckless, unbridled manner

to propagate its anti-union, autocratic, dictatorial, undemocratic attitude upon the press and means of publication in the area of the Company town of Kohler, Wisconsin.

11 6. That to this date the office of the Governor of the State of Michigan has withheld the issuance of a Governor's Warrant in consideration of the basic constitutional rights of your petitioner.

7. That your petitioner is prepared and stands ready to repair to the State of Wisconsin to answer the false charges against him upon the cessation of the present course of conduct of the anti-union, hate-mongering campaign of the Kohler Company which is designed to stir the people in the area to irrational, emotional and undemocratic hostilities.

8. That your petitioner is prepared and stands ready and herewith offers to appear before the proper officer or tribunal within the County of Wayne in the State of Michigan and there to make proper answers to all inquiries which may be put to him with respect to matters herein involved if your petitioner's testimony be deemed in any way material or relevant to the issues before the Board in these proceedings.

9. That to require the petitioner to respond to the Subpena issued in this cause at this time on the request of Lyman C. Conger, Agent of the Employer, would be subterfuge and indirection depriving your petitioner of his rights as a citizen of the State of Michigan and a citizen of the United States of America; to require petitioner's presence by this Subpena would by indirection and subterfuge deny to the Governor of the State of Michigan the prerogatives vested in him by the Constitution of the State of Michigan and the Constitution of the United States of America.

10. That your petitioner is a man of humble means and to require him to leave his employment in order to travel the great distance to the place of hearing and to return would be unjust and unfair and an oppressive use of the power of the Board; to require the travel and absence from the Detroit area for so long a period would tend to jeopardize and deprive your petitioner of his employment and means of livelihood to the unnecessary anguish of your petitioner and his dependents; that this would be particularly oppressive and unjust an exercise of

the Board's power against the petitioner in the face
12 of the fact that procedures are readily available for the taking of your petitioner's deposition and testimony in the Detroit area in a manner not to cause the imposition of these unjust and unduly personal burdens upon petitioner and his family.

11. That the request of Lyman C. Conger, Agent of the Kohler Company, for issuance of this Subpena was maliciously, unjustly and unfairly motivated with no regard for the individual rights of your petitioner, with knowledge of pending extradition proceedings, and your petitioner's humble station in life and was an act which is a part of the Company's total disregard and disrespect for the individual and the rights granted and conferred upon him by the law of the land; that the request was made not for the purpose of presenting any further facts or evidence to assist the Board in its duties because the Company and its representatives and agents are well aware that your petitioner's testimony is not material or relevant to the hearing; that the Company agent, Lyman C. Conger, is using the Board processes for purposes other than those which are connected with the hearings before the Board.

12. That your petitioner is not aware of any knowledge in his possession which could in any manner shed any light on the matters before the Board in these proceedings.

Wherefore your petitioner prays that the Subpena issued on the request of Lyman C. Conger, agent for the Kohler Company of Kohler, Wisconsin, be revoked.

/s/ John Gunaca,
John Gunaca.

Rothe, Marston, Mazey, Sachs
& O'Connell,

By /s/ William Mazey,
William Mazey,
*Attorneys for the Petitioner*,
3610 Cadillac Tower,
Detroit 26, Michigan,
WOodward 5-3464.

13 "Exhibit D."

Proceedings.

Trial Examiner Downing: The hearing will be in order. Mr. Marston, do you wish to note your appearance here?

Mr. Marston: I am making a special appearance, may it please the Trial Examiner, in relation to the matter of a subpoena which was issued and served—

Trial Examiner: State your name and address.

Mr. Marston: D. Charles Marston. My office address is 3610 Cadillac Tower, Detroit 26, Michigan.

Trial Examiner: Whom do you represent?

Mr. Marston: I am appearing here on behalf of John Gunaca.

Trial Examiner: All right, sir.

Mr. Marston: May I proceed, your Honor?

Trial Examiner: Yes.

Mr. Marston: I have a petition to revoke a subpoena under the rules of proceeding, and served a copy of this petition on the representative of the company, representative of the Board, and the attorneys for the union.

Trial Examiner: I suggest that this petition be identified with an exhibit number. If the General Counsel doesn't wish to use his series, I will give it a Trial Examiner's number.

Mr. Gore: I think that would be preferable.

Trial Examiner: We will mark it Trial Examiner
14 Exhibit Number 1 for identification.

(Whereupon, the document above referred to was marked Trial Examiner Exhibit 1 for identification.)

Mr. Marston: May it please the Trial Examiner, as my petition sets out, we are appearing specially here in response to a subpoena which was served on Mr. John Gunaca on the 12th of August, 1955.

The subpoena was served in the City of Detroit on Mr. Gunaca by an individual who identifies himself as George Harrison. This individual handed Mr. Gunaca a subpoena form of the Board, apparently. We have set it out by way of copying it in our petition, and I have the paper which was served on Mr. Gunaca here in my possession. I presume the Trial Examiner would like to have this marked as an exhibit.

Trial Examiner: Let's see. Don't you copy it in your petition?

Mr. Marston: Yes. It is all set out in the petition.

Trial Examiner: I don't think it is necessary to file the subpoena, then.

Mr. Marston: Fine. Mr. Gunaca, as we set out in the petition, was a party or subject of an extradition proceeding on the 17th of September the governor of Wisconsin, Governor Kohler, issued a request to the governor of Michigan for the extradition of Mr. Gunaca from Michigan to Wisconsin on a charge in Wisconsin.

15 Thereafter, Mr. Gunaca was arrested on the 29th of September, 1954. He was arrested in Detroit, taken from Detroit to the City of Pontiac in Michigan where he was arraigned before a circuit judge on the fugitive warrant. He was then released on a recognizance to return at the pleasure of the circuit court judge.

He put up a recognizance of $1,500 with the court with two sureties. He is presently in the State of Michigan, in the City of Detroit under the terms of that recogniz-

16 ance. That is on file with the Circuit Court in the County of Oakland.

At that time, the petitioner, Mr. Gunaca, requested a hearing before the Governor of the State of Michigan, seeking to be heard with respect to the petition for extradition filed by the Governor of Wisconsin. He then was given a hearing.

At the hearing he set out the contention of the petitioner, our contention, that he could not, and would not, be granted a fair trial if he were brought back to Wisconsin at that time, or at this time, for the reason that the Kohler Company has been spending large sums of money in an effort to influence the thinking of the people in the area of Sheboygan, and has tried to impress on this area the attitude of the company against the union and against the requirements of modern-day labor relations.

Now, Mr. Gunaca has been successful thus far in persuading the Governor of Michigan to withhold action on the extradition request of the Governor of Wisconsin.

I might say to the Trial Examiner, that we set it out in our petition that Mr. Gunaca advised the Governor of Michigan that he is prepared to come to Wisconsin and stand trial when the Kohler Company's relationships with the union are such that the chances for him to be afforded a fair trial are better than they are now.

We also set out in our petition, Mr. Trial Examiner, that in addition to these extradition proceedings, and the bail bond he has placed, that Mr. Gunaca is an employed person working for a living in Detroit; that there
17 is available to the Board and to this proceeding, to the parties involved and to the company which has asked for his appearance here, a deposition proceeding. That is available to them.

Trial Examiner: What is available to them?

Mr. Marston: A deposition proceeding, which can be used under the rules.

Trial Examiner: It is not used very often.

Mr. Marston: That may be so, Mr. Trial Examiner, but it is available and since it is available, and is a mode of obtaining testimony, we are offering Mr. Gunaca's testimony in that fashion. That will afford him an opportunity to testify as to those matters which he may be inquired about. He then will not be required and forced to leave his employment, jeopardize his employment and come here.

Trial Examiner: Is it your view—I do not think you say it in your petition,—that this is simply a subterfuge to get him here to bring him to trial on the Wisconsin charge?

Mr. Marston: That is our feeling, yes.

Trial Examiner: Well, I have some dim recollection from my private practice that a witness was immune from service of a subpoena while in attendance in court under another subpoena.

Mr. Marston: I have tried to check that in the short time I have had available to me, Mr. Examiner, and I find the rule is clear that civil process cannot be served
18 while a person is in answer to a subpoena. However, as I understand the rule, this does not prevent arrest in the jurisdiction of a person. The other aspect of the matter which you might be thinking about is that if a person is extradited from one state to another, or from one jurisdiction to another, that he can be tried only for the matter for which he is extradited.

I suggest this is not an extradition proceeding before the Board.

Trial Examiner: Your petition does not state what he is charged with in Wisconsin. What is it, for my information?

Mr. Marston: I think it is felonious assault.

Trial Examiner: And where is he charged with that?

Mr. Marston: I believe here in Sheboygan.

19 Trial Examiner: What court, do you know?

Mr. Marston: No, I don't.

Trial Examiner: Is there any claim on your part that the witness's testimony would not be relevant in any manner to the issues appearing here?

Mr. Marston: I stated that in the petition.

Trial Examiner: What paragraph?

Mr. Marston: Paragraph 12.

Trial Examiner: You say you are not aware of any?

Mr. Marston: I would like to inquire of counsel for the respondent the relevancy of the witness's testimony.

Mr. Conger: Mr. Gunaca, we expect to show, was sent here as an agent of the union, participated in the strike activities, and the picketing activities which we claim are illegal and we intend to show by Mr. Gunaca's testimony a direct connection between certain illegal activities which the union has disavowed and the fact that there is a connection between those activities and the union.

Trial Examiner: There is another point, although this is something the Governor of Michigan should be concerned with on extradition; it seems to me that on a proper showing in this court, or whatever court the matter will be pending in, the court would grant a change of venire; if a fair and impartial trial cannot be had in this county, the matter could be on an appropriate motion moved into

20 another county. I think certainly some judges in this state could give your client a fair and impartial trial.

Mr. Marston: That isn't a matter on which you are entitled to pass in any way.

Trial Examiner: I stated that before I made my statement, that it was not a matter for me to be concerned with; it is a matter for the Governor of Michigan to be concerned with.

Mr. Marston: He is satisfied, as things stand now, that Mr. Gunaca could not get a fair trial.

Trial Examiner: Obviously the issues presented in this petition are mainly ones that I shall be unable to determine here. It does appear on representation of counsel that the witness will be called upon to give testimony which is or may be relevant to the issues. What further am I to be concerned with? What can I be concerned with other than that?

Mr. Marston: As I understand the rule you have the right and authority to revoke a subpena if the subpena be oppressive.

Trial Examiner: May I be cited to the appropriate section of the regulations? Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

The pertinent sentence of the pertinent section appears to read as follows: "The Trial Examiner or the board, as the case may be, shall revoke the subpena if in its opinion the evidence whose production is required does not
21 relate to any matter under investigation or in question in the proceedings, or the subpena does not describe with sufficient particularity the evidence whose production is required." I don't see that the showing here is adequate to enable me to revoke the subpena.

Mr. Marston: May I see that regulation for a moment?

Trial Examiner: Yes.

22 Mr. Marston: I'm sorry for the delay, Mr. Trial Examiner.

Trial Examiner: That is quite all right.

Mr. Marston: I don't find it in the regulations. It is my understanding, and I believe it to be a fact that among the power of the Trial Examiner, it is the case of NLRB versus Pesante, in the February term, 1954, for the District Court of California, Southern Division.

In that case the court goes into the question of the issuance of a subpoena by the Board. It discusses the problems of issuance of form subpoenaes with rubber stamps on them, and other matters which are not pertinent in this particular proceeding.

In that case, the court points out that the subpoenaes issued by the Board requiring an employer to produce records, writings of his own, for examination at some indeterminate time by a hearing officer was an oppressive subpoena.

Trial Examiner: That apparently related to a pretrial investigation.

Mr. Marston: Yes.

Trial Examiner: Well, this is an entirely different situation we have here.

Mr. Marston: The only question there was whether or not the subpoena should have been revoked and there the

court did discuss among other things the matters as
23 to relevancy and materiality to the proceedings, and ruled that the subpoena should have been revoked in that case because it was oppressive.

Now, I submit to the Trial Examiner—

Trial Examiner: That is an ordinary rule. Subpoenaes may be revoked if they are oppressive.

Mr. Marston: Well, I submit that certainly under any stretch of the imagination to require a man who is under bail to forfeit his bail to come here would be an oppressive proceeding. In order for him to leave Michigan, he has got to forfeit $1,500 and come here.

Trial Examiner: I don't see that that follows.

Mr. Marston: He is under bail. He is required to remain.

Trial Examiner: Remain where?

Mr. Marston: In Michigan.

Trial Examiner: I don't follow you on that. If he were to come here to Wisconsin to answer the charge, he certainly wouldn't be forfeiting his bail, would he?

Mr. Marston: He would have to report back to the circuit court, Mr. Trial Examiner, before he came to Wisconsin to answer the charge and advise them that he was so reporting, and advise the sureties so that they could protect themselves.

Trial Examiner: As I see it your petition does not make out a case for revocation of subpoena under the Board's regulations.

24 If I were of a different mind and would grant your petition, there might be another manner in which this matter could be disposed of.

However, mainly you raise questions which appear to me are appropriate for disposition in some other tribunal.

Mr. Marston: Excuse me for a moment.

Trial Examiner: Yes.

25 Trial Examiner: And, of course, the method for getting such a disposition is obvious. It is a matter that can ultimately be resolved by the federal judge.

Mr. Marston: It may be the way to resolve it, Mr. Trial Examiner, but I submit that certainly this is an obvious procedure on the part of the employer here. There is an extradition proceeding going on. They are aware of it. It isn't a secret to them.

Trial Examiner: What has it got to do with the issue

here? Here is a man who has been subpoenaed to give evidence in this proceeding. Apparently the evidence is relevant. What has the extradition proceeding got to do with the subpoenaing of him here to testify in that proceeding?

Mr. Marston: Well, it has this to do with it, Mr. Trial Examiner. The Trial Examiner nor the Board should permit Board processes, federal processes to be used to flaunt other constitutional guarantees and that is what is happening here.

Trial Examiner: I do not see that that follows: I have suggested several considerations which might be considered by the Governor of Michigan which might be raised here if your client is brought to trial here to guarantee his constitutional rights, a fair and impartial hearing, a fair and impartial trial.

Mr. Marston: He has one constitutional guarantee which would be deprived him by this subpoena. He has a right to stay in Michigan if he wants to and the Governor of Michigan,—

26 Trial Examiner: No person has a right to stay anywhere when subpoenaed by an authority to testify under appropriate subpoena.

Mr. Marston: This subpoena actually deprives the Governor of Michigan of the right to answer to that extradition proceeding. This is an indirect way of achieving something that the Kohler Company and the State of Wisconsin cannot achieve constitutionally.

Trial Examiner: There may be arguments you can make it a different tribunal, but I do not think there is any question I can rule on here. Your petition does not make a sufficient basis under the Board's rules and regulations in my opinion.

If there is no further argument—do you care to be heard further?

Mr. Marston: No, I have said what I have to say. It is in the petition. The basic argument is in the petition.

Trial Examiner: I will deny the petition.

Mr. Marston: How many copies shall I leave with the Board?

Trial Examiner: Well, I do not know it is necessary. Actually, you have the original. I suggest you leave one copy. However, your petition, as I see it, forms no part of the file in this case, except incidentally for the purpose

of forming a basis for further proceedings in court, if necessary.

Mr. Marston: Thank you, sir.

Trial Examiner: Mr. Conger, will you take the stand?

LYMAN C. CONGER, resumed the stand and testified further as follows:

27 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-265) * *

## ANSWER TO ORDER TO SHOW CAUSE.

(Filed Sept. 28, 1955. Dale E. Ihlenfeldt, Clerk.)

Now comes John Gunaca, Respondent in the above-entitled matter, and appearing specially by his counsel, Rothe, Marston, Mazey, Sachs & O'Connell, in answer to the Order to Show Cause says:

1. Answering Paragraph 1 of the Application for Order requiring obedience to subpoena ad testificandum, the respondent denies that the Court has jurisdiction over the person of the respondent in that this process may not properly be served without the geographical limitations of the judicial district encompassed by the United States District Court for the Eastern District of Wisconsin; for further answer to said Paragraph 1, your respondent further denies that the Court has jurisdiction of the subject matter of the proceeding by virtue of Section 11(2) of the National Labor Relations Act, as amended, in that the National Labor Relations Board has made no ruling on your respondent's Petition to the Board to revoke the subpoena issued by it; the respondent is a resident, inhabitant and citizen of the City of Detroit, State of Michigan, and is not, and was not, subject to service of process within the Eastern District of Wisconsin; that the Application was brought in the wrong District because (a) the jurisdiction of this Court is invoked solely on the ground that the action arises under the law of the United States, and (b) the respondent is a citizen, resident and inhabitant of the City of Detroit, Michigan.

2. Answering Paragraph 2, respondent admits that the

Board has issued rules and regulations as set forth in Paragraph 2 of the Application and for further answer to said Paragraph 2, respondent denies that the rules and regulations are lawful and operative with respect to the Board's delegation of the discretion vested in it to act on Petitions for revocation of subpoenas and respondent asserts that the rules and regulations delegating the discretion of the Board to anyone to act in its place and stead on Petitions to revoke subpoenas are not lawful.

28 3. Answering Paragraph 3, your respondent is without knowledge in the premises and is not a party to any proceedings as set out in said paragraph 3.

4. Answering Paragraph 4, your respondent is informed and believes it to be true that the National Labor Relations Board did cause to be issued on August 5, 1955 at the written request of Lyman C. Conger, agent for the Kohler Company, a subpoena, of which Exhibit A appears to be a true photostatic copy, said Exhibit A having been handed to respondent by one George Harrison on the 12th day of August, 1955 in the City of Detroit at which time a sum of money was tendered to him; for further answer to said Paragraph 4 of the Application, your respondent denies that the subpoena was lawfully issued or served upon the respondent.

5. Answering Paragraph 5, your respondent did, by his attorneys, make special appearance and cause to be filed with the Board, in accordance with its rules, a Petition to revoke the subpoena issued on the request of Lyman C. Conger, agent for the Kohler Company; that the attorney for the respondent appearing specially before the trial examiner did present the Petition for Revocation and did make argument before the trial examiner who purported to make a ruling asserting that the issues presented by the Petition were mainly ones that he was unable to determine (Exhibit D 8 of Application); for further answer to said Paragraph 5, your respondent Asserts that the transcript of the hearing before the trial examiner with respect to any matters other than the filing of the Petition for Revocation with the Board are irrelevant.

6. Answering Paragraph 6, your respondent asserts that he has failed to appear in response to the alleged subpoena and that, to date, his Petition for Revocation has not been acted on by the National Labor Relations Board to

the knowledge of your respondent, except that the trial
29 examiner did assert that "As I see it, your Petition does not make out a case for revocation of subpoena under the Board regulations." (Exhibit D 11 of the Application.) For further answer to said Paragraph 6, your respondent is informed that a telegraph communication was received by Mr. D. Charles Marston who was acting specially on behalf of your respondent with respect to the Petition for Revocation and did file same on behalf of your respondent, but that the said D. Charles Marston did not appear, nor has he appeared, on behalf of your respondent as your respondent's attorney. That the telegraph and reference thereto, is immaterial and irrelevant to these proceedings. Further answering Paragraph 6, your respondent is without knowledge as to the conduct of Mr. Lyman C. Conger on August 31, 1955.

7. Answering Paragraph 7, your respondent denies that he has been guilty of any conduct whatever of a contumacious nature within the meaning of Section 11 (2) of the National Labor Relations Act in that the alleged subpoena served upon the respondent was unlawfully issued and served and the National Labor Relations Board should act to revoke it in accordance with the reasons and grounds for revocation set forth in the Petition filed with the National Labor Relations Board by your respondent to which Petition your respondent respectfully urges the attention of the Court and adverts to said Petition as additional Answer to the Court's Order to Show Cause as if the same were fully set forth herein.

8. For further answer to the Court's Order to Show Cause, your respondent makes special appearance by his attorneys, Rothe, Marston, Mazey, Sachs & O'Connell, in writing herein as required by said Order, the person of your respondent being required to be present before the Honorable Frank L. Doty, Circuit Judge, in and for the County of Oakland, State of Michigan, then and there to appear on a hearing before the said Circuit Judge on the fugitive warrant which your respondent has heretofore answered and with respect to which fugitive warrant your respondent is answerable in bail in the amount of Fifteen Hundred ($1500.00) Dollars, with two sureties, said hearing before the Honorable Circuit Judge being set for 9:30 o'clock A. M. in the forenoon, the 3rd day of October, 1955.

9. For further answer to the Court's Order to Show Cause, your respondent is defendant in criminal prosecution and immune from civil process and in the custody of the People of the State of Michigan.

Wherefore your respondent prays that the Order to Show Cause issued in this cause be dismissed and that each and every of the prayers of the Board be denied.

Rothe, Marston, Mazey, Sachs & O'Connell,
By /s/ D. Charles Marston,
*Attorneys for Respondent*,
3610 Cadillac Tower,
Detroit 26, Michigan,
WOodward 5-3464.

Dated: September 27, 1955.

31 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-265) * *

## MOTION TO DISMISS ORDER TO SHOW CAUSE.

(Filed Sept. 28, 1955. Dale E. Ihlenfeldt, Clerk.)

Now Comes John Gunaca, Respondent in the above-entitled matter, and appearing specially by his counsel, Rothe, Marston, Mazey, Sachs & O'Connell, moves the Court as follows:

1. To dismiss the Order to Show Cause, or in lieu thereof to quash the return of service of the Order to Show Cause, on the grounds that the respondent is a citizen, resident and inhabitant of the City of Detroit, State of Michigan, and was not, and is not, subject to service of process within the Eastern District of Wisconsin as is set forth in the Affidavit of D. Charles Marston hereto annexed as Exhibit A.

2. To dismiss the Order to Show Cause on the grounds that it is in the wrong district because (a) the jurisdiction of this Court is involved solely on the ground that the action arises under the National Labor Relations Act and (b) the respondent is a citizen, resident and inhabitant of the City of Detroit, Michigan.

3. To dismiss the Order to Show Cause on the grounds that the Court lacks jurisdiction over the subject matter

of the proceeding in that the National Labor Relations Board has made no ruling on your respondent's Petition to the Board to revoke the subpoena issued by it as is set forth in the Application filed by the Board.

4. To dismiss the Order to Show Cause on the grounds that your respondent is awaiting criminal prosecution and is immune from civil process and is in the custody of the People of the State of Michigan.

32 5. To dismiss the Order to Show Cause because the Application for Order requiring obedience to subpoena ad testificandum fails to state a claim against respondent upon which relief can be granted.

Wherefore respondent prays that the Order to Show Cause be dismissed.

Rothe, Marston, Mazey, Sachs & O'Connell,
By /s/ D. Charles Marston,
*Attorneys for Respondent,*
3610 Cadillac Tower,
Detroit 26, Michigan,
WOodward 5-3464.

Dated September 27, 1955.

33 Exhibit "A".

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Wisconsin.

National Labor Relations Board,
on Relation of Kohler Co.,
*Applicant,*
*vs.*
John Gunaca,
*Respondent.*
No. 55-C-265.

AFFIDAVIT.

State of Michigan,
County of Wayne. } ss.

D. Charles Marston being duly sworn deposes and says that he is acquainted with the person of John Gunaca and has been acquainted with him for a number of years; that he knows of his own knowledge that John Gunaca is a resident of the City of Detroit, State of Michigan; that the said John Gunaca has been an inhabitant of the City of Detroit and State of Michigan for several years last past; that John Gunaca was a resident of the City of Detroit, State of Michigan on August 12, 1955, on September 22, 1955, and is presently a resident of said City and State.

Further deponent sayeth not.

/s/ D. Charles Marston.

Subscribed and sworn to before me this 27th day of September, A. D. 1955.

/s/ Margaret Sumiec,
*Notary Public, Wayne County, Michigan.*

My commission expires: 6/12/1956.

34 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-265) * *

## OPPOSITION TO MOTION TO DISMISS ORDER TO SHOW CAUSE.

(Filed Oct. 3, 1955. Dale E. Ihlenfeldt, Clerk.)

Now comes the National Labor Relations Board, by its Assistant General Counsel, Marcel Mallet-Prevost, and submits the following opposition to respondent's motion dated September 27, 1955, to dismiss the Order to Show Cause herein:

1. There is no merit to respondent's contention (pars. 1 and 2) that the process of this Court could not properly reach respondent, a citizen and resident of Michigan. "Congress may authorize the civil process of a federal district court to be served upon persons in any other district" (*Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 683), and it has so provided in the National Labor Relations Act.

Thus, the instant proceeding was instituted pursuant to Section 11(2) of the Act (29 U. S. C., Sec. 161 (2)), which confers jurisdiction, "upon application by the Board," upon "any district court of the United States * * * within the jurisdiction of which the inquiry is carried on *or* within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business." (Emphasis supplied.) The jurisdiction of this Court rests on the first alternative, the hearing which respondent was subpenaed to attend being conducted at Sheboygan, Wisconsin, within this judicial district. Service of
35 process in this proceeding outside the geographical district of this Court is specifically sanctioned by Section 11(5) of the Act (29 U. S. C. 161(5)) which provides that "All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found."

2. Nor is there merit to respondent's contention (par. 3) that the Court lacks jurisdiction because respondent's petition to revoke the subpena, provided for by Section 11(1) of the Act (29 U. S. C. 161(1)), has not been ruled on by the Board. Respondent's petition to revoke the subpena was

expressly denied by the Board's trial examiner (Ex. D-14) (Attached to the Application for Order to Show Cause.) The trial examiner acted pursuant to Section 102.31(b) of the Board's Rules and Regulations (29 C. F. R. 102.31(b)), which, in relevant part, authorizes a trial examiner to revoke "the subpena if in (his) opinion the evidence * * * does not relate to any matter * * * in question in the proceedings * * *."

It is settled that this delegation of authority to the trial examiner to rule on petitions to revoke subpenas is valid and proper. *N. L. R. B.* v. *John S. Barnes Corp.*, 178 F. 2d 156, 159-160 (C. A. 7); *N. L. R. B.* v. *International Typographical Union*, 76 F. Supp. 895 (S. D. N. Y.).* Respondent did not request the Board for special permission to appeal the trial examiner's ruling on its petition to revoke, which procedure is provided for in Section 102.26 of the Board's Rules.

For the foregoing reasons, as well as the reasons set forth in the Board's Application, it is respectfully
36 submitted that respondent's motion to dismiss the Order to Show Cause should be denied and that the relief sought in said Order to Show Cause should in all respects be granted.

/s/ Marcel Mallet-Prevost,
*Assistant General Counsel, National Labor Relations Board.*

Dated: Washington, D. C., this 30th day of September, 1955.

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* To the extent that *N. L. R. B.* v. *Pesante*, 119 F. Supp. 444 (S. D. Calif.) looks to the contrary, it is admittedly in conflict with the *Barnes* decision of the Court of Appeals for this Circuit (119 F. Supp. at 456). Moreover, since *Pesante* did not, as here, involve a subpena returnable before a trial examiner of the Board, there was no occasion for the Court to consider the Administrative Procedure Act which, as the *Typographical* case, *supra*, holds, affords an independent statutory basis for conferring the power to rule on petitions to revoke on trial examiners.

37 UNITED STATES DISTRICT COURT.

* * (Caption—55-C-265) * *

## OPINION.

(Filed Nov. 22, 1955. Dale E. Ihlenfeldt, Clerk.)

This matter is before the Court on an order to show cause by the applicant why an order should not be entered requiring the respondent to obey a certain subpoena ad testificandum issued by the Board and served on the respondent.

The record shows that in connection with a proceedings before a National Labor Relations Board examiner on the question of an unfair labor practice the relator requested and the trial examiner of the Board issued a subpoena to the respondent which was duly served upon him calling upon him to attend a hearing before the trial examiner of the Board at Sheboygan, Wisconsin, on August 18, 1955. At the time of the return of the subpoena respondent appeared by an attorney (he stated he was making a special appearance), and filed a petition to revoke the subpoena. This was heard by the trial examiner who denied the petition to revoke the subpoena. In the proceedings before the examiner, and here, many contentions are urged.

The record discloses that the respondent is a resident of Detroit, Michigan. It further discloses that a warrant for the arrest of the respondent on a charge of a felonious assault was issued in Sheboygan County, Wisconsin; that request was made for the extradition of the respondent from the state of Michigan to answer that charge; that the Governor of Michigan has not granted extradition as of the time of the hearing in this matter, but that respondent did post bond with a state court in Michigan. The terms of this bond are not shown by the record, but it can only be assumed from the record that the bond is conditioned upon his appearance if extradition is granted. The respondent claims that he would be unable to get a fair trial if he were to come to Wisconsin to answer the charges.

38 The Court will take up the various contentions of the respondent which are as follows:

## I.

Respondent contends that the venue in this proceeding is incorrect and that it should have been brought in the District Court in Michigan. Title 29, U. S. C. A., Sec. 161 (1) provides that the Board or any member thereof shall, upon application of any party to proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or production of evidence.

> "Such attendance of witnesses * * * may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

Congress could not have used broader language with reference to the geography. Subsection (2) provides that in case of contumacy or refusal to obey a subpoena

> "* * * any District Court of the United States * * * within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found * * * upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce the evidence if so ordered. * * *"

The plain language of the statute gives to the Board the right to bring this proceedings in either the District Court within the jurisdiction of which the inquiry is being carried on or within which such person is found or resides. The city of Sheboygan is within the jurisdiction of the Eastern District of Wisconsin. Respondent has cited no decisions nor has the Court been able to find one holding that the quoted language means other than what it says.

## II.

Respondent contends that this Court has no jurisdiction over the person of the defendant. The provisions above quoted also seem on their face to answer that contention. Subsection (5) specifically provides:

> "All process of any court to which application may be made under sections 151-166 of this title may be

served in the judicial district wherein the defendant or other person required to be served resides or may be found."

That language is not susceptible of any holding that the process of the Court in this proceedings is confined to the Court's district. Again, no decision has been cited, or found by the Court, limiting such language.

39 "Congress may authorize the civil process of a Federal District Court to be served on persons in any other district." *Continental Bank* v. *Rock Island Railway*, 294 U. S. 648, 683.

## III.

The contention is made that even if process of this Court reached into Michigan, this Court could not punish a Michigan resident for contempt, in other words, could not enforce the process. Title 29, U. S. C. A., Sec. 161 (2) above quoted, in addition to giving the Court power to issue an order requiring such person to appear before the Board or its agent, expressly provides:

> "* * * any failure to obey such order of the court may be punished by said court as a contempt thereof."

Here again is an express provision in the Act of Congress not susceptible in the Court's opinion to any interpretation other than just what it states. Counsel have cited no decisions to the contrary.

In *N. L. R. B.* v. *Hearst*, 102 F. 2d 658 (CCA 9), the court said in answer to a contention that valid service could not be made outside the judicial district fixed by the Board in which the unfair labor practice occurred:

> "The contention is based on an alleged lack of geographic reach. * * * the act specifically permits the Board to designate the place of hearing, Sec. 10 (b), which implies that service can be made anywhere in the United States. Since 'Congress may authorize the civil process of a Federal District Court to be served upon persons in any other district' * * *, it has power, we think, to authorize service by this act anywhere within the United States."

## IV.

Respondent contends that the Board itself must act on the issuance and revocation of a subpoena before the Court can enforce such subpoena. This claim is based upon the position that the Board cannot delegate its powers of issuance and revocation of subpoenas.

This contention presents a close question and one upon which there has been disagreement. Thus, in *N. L. R. B.* v. *International Typographical Union*, 76 F. Supp. 895, when the matter was presented to District Judge Medina, he held that the power could be delegated. He placed great stress upon the Administrative Procedure Act, 5 U. S. C. A. Sec. 1001, et seq. His decision seems to this Court to be logical and reasonable. He points out that if the Act were to be interpreted otherwise and without reference to Section 7 (b) of the Administrative Procedure Act,

> "* * * the result might well be a most burdensome and unecessary deluge of motions to revoke subpoenas and the Board, in many if not most cases, would find it impossible to determine such motions on the merits without procuring lengthy transcripts of proceedings before trial examiners, together with copies of voluminous documents and exhibits. In the absence of clear language to that effect, it is not to be supposed that the Congress intended to involve the National Labor Relations Board in such a morass of procedural detail."

We next find the matter considered by the Seventh Court of Appeals in *N. L. R. B.* v. *Barnes, et al.*, 178 F. 2d 156. The court there stated, among other things:

> "However, if we are to determine the intent of Congress, we must go further than an investigation of the language of the particular section of the Act. We must consider the Act as a whole, its various provisions, its purpose, what Congress expected the National Labor Relations Board to accomplish under the Act, and its legislative history.
>
> "The mere fact that certain sections of this Act authorize the delegation of certain powers by the Board has not been generally construed as depriving the Board of the power to delegate certain other powers, the delegation of which is not expressly authorized."

* * * * *

> "By Section 5 of the Act, the Board was given the power 'by one or more of its members or by such agents or agencies as it may designate, (to) prosecute any inquiry necessary to its functions in any part of the United States.' The issuance of subpoenas is a necessary incident to the power to investigate and prosecute."

While it may not have been necessary to the decision of the case, the court thereafter said this with reference to the matter of revocation of subpoenas:

> "If we were to adopt the restrictive construction of this section for which the respondents contend, we would necessarily be compelled to also hold that all such petitions must be submitted to the Board and must be acted on by not less than three members of the Board. This would necessarily require sending to the Board sufficient information concerning the matters under investigation to make it possible for the Board to intelligently pass upon such petition.
>
> "If we were to hold that the Board, or one of its members, must personally do every act essential to the execution and issuance of each subpoena in every proceeding being conducted under this Act throughout the United States and its Territories, and that the Board must then, as a Board, pass upon every petition for the revocation of any subpoena, it would be physically impossible for the Board and its members to perform the many other more important duties which they are required to perform to accomplish the purpose of the Act."

Neither of the above decisions has been reversed or overruled so far as the Court has been able to ascertain.

41 There is one decision holding to the contrary, that of District Judge Hall in *N. L. R. B.* v. *Pesante*, 119 F. Supp. 444. In this case Judge Hall, mainly by an analysis of the statute and the amendments to it and without regard to the Administrative Procedure Act and without regard to the practical effect of such holding, decides directly contrary to the previous two cases. The reasoning of the *International Typographical Union* and the *Barnes* cases appeals to this Court more than that in the *Pesante* case. It would seem to this Court that one should be very slow to presume that the Congress intended to enact a statute

which would require a review of testimony possibly two or three thousand miles from the place where testimony was taken after having it transcribed with all the attendant delays and expense in proceeding before the N. L. R. B. that would be involved. Such construction would make it impossible as a practical matter for the N. L. R. B. to carry out its functions. Certainly they couldn't carry them out expeditiously as Congress no doubt intended. Labor peace or proper labor relations would be sacrificed to innumerable administrative delays. Labor unions most frequently seek redress before the Board because of unfair labor practices of employers. The Congress no doubt meant to afford them expeditious hearings and relief not to be delayed by such cumbersome and delaying procedure as would be necessary if the Board itself had to review all such rulings. Such construction would put an impossible burden upon the Board. The Court has been unable to find that the *Pesante* case has been reversed or overruled.

V.

Respondent contends that the Court must determine whether or not defendant's testimony is material in the Sheboygan hearing. It was stated during the oral argument that the hearing had been going on for a considerable length of time. At one time it was stated that the matter was about to go into the fiftieth hearing and at that time covered about eight thousand pages of transcript. This statement of counsel is not evidence or before the Court in affidavit form. In testing whether it was intended that the Court determine whether the testimony would "relate to" or "touch on" any matter under investigation by the Board, the Court can consider that it is common knowledge that these hearings sometimes go on for weeks and even months with many, many witnesses and thousands of pages of testimony. The Board and its trial exam-
42 iner have the advantage of having seen and heard the many witnesses and of having first hand knowledge of the issues and controversies.

This Court believes that had it been intended that the Court itself pass upon these criteria de novo, provision would have been made that a transcript of testimony at least be furnished to the Court together with such other parts of the record as to enable the Court to intelligently pass on that question. One would be loath to assume that

the Congress meant any such cumbersome procedure. The findings and orders of the Board are subject to judicial review in the Courts of Appeal. Any error could no doubt be reached in the regular process of review. To have the Court pass upon these criteria during the pendency of the hearing before the Board would be as illogical as it would be to have a trial court stop in the middle of a trial, have the record transcribed and sent to the appellate court to review a ruling on evidence or on a procedural question. In the absence of a clear and strong showing that the evidence does not meet the criteria, it is the opinion of the Court that it should not try to review that ruling, having no copy of the record. There should be no presumption of error in the ruling. There is no showing in this record in that respect such as to move the Court to substitute its judgment on the question for the judgment of the Board or its examiner who has seen and heard the witnesses and is thoroughly familiar with the record. As stated by the United States Supreme Court in *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501:

> "The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration. * * * The consequence of the action of the District Court was to disable the Secretary from rendering a complete decision on the alleged violation as Congress had directed her to do. * * * Congress sought to have the procurement officers advised by the experience and discretion of the Secretary rather than the District Court. To perform her function she must draw inferences and make findings from the same conflicting materials that the District Court considered in anticipating and foreclosing her conclusions."

In *Cudahy Packing Co.* v. *N. L. R. B.*, 117 F. 2d 692 (CCA 10) it is stated:

> "When an application is filed with a District Court for an order requiring obedience to a subpoena it may inquire only to ascertain that a proceeding is pending before the Board of which it has jurisdiction and that the evidence sought relates to or touches the matter under investigation. If these facts are found to exist, it is the duty of the court to order obedience to the subpoena.

43 "The only defenses that a respondent may assert in such a proceeding are that the proceeding in which the evidence is sought is not one of which the Board has jurisdiction or that the evidence does not relate to or touch the matter under consideration. It may not in such a proceeding assert its defenses in the principal case."

## VI.

Defendant contends that the subpoena is oppressive and enforcement of it would create undue hardship for him upon the ground (a) that the defendant needs to be on his job and will be deprived of income, and (b) that the defendant would have to travel a long distance.

With reference to ground (a) the record is silent as to what the respondent's employment is, what his income is from that employment, as to whether he is a key man in any organization whose absence would disrupt a plant and throw many people out of work, or cause an unusual hardship of any kind. This record merely is to the effect that the defendant has some kind of work, apparently in Detroit. Any time any witness is served with a subpoena and compelled to attend as a witness at a trial in court or a hearing before any administrative agency, federal or state, he must leave his job, and if his job pays more than the witness fee, be deprived of that much of his income. If such were a sound basis for suppressing or refusing to enforce a subpoena, no judicial or administrative proceedings of any kind could be had.

As to its being oppressive to require the defendant "to travel a long distance" it must again be remembered that the Congress in the provisions of this Act making the subpoena effective anywhere in the United States or any territory thereof used very plain language. Michigan is one of four states immediately contiguous to Wisconsin. The distance from Detroit, Michigan, to Sheboygan, Wisconsin, is indeed mild compared with the distances implied in the language of the Congress making the subpoena effective anywhere in the United States. If the subpoena were not to be effective in an adjoining state, the Congress used most inappropriate language. The Congress evidently felt that the functions of the Board were important enough so that its subpoenas are given much greater territorial validity than the subpoenas of the various District Courts in the ordinary proceedings before

them. The Congress could have, but did not, provide that where witnesses resided more than a specified distance from the place of hearing they could not be compelled to attend but that a deposition be substituted for personal attendance.

44 VII.

Respondent claims that enforcement of the subpoena would be oppressive or unreasonable because he claims that he could not have a fair trial in Sheboygan.

Section 261.08 of the Wisconsin Statutes provides that a defendant may move to have another judge brought in to hear his case because of the prejudice of the sitting judge. That statute is extremely broad. Under the provisions of Section 261.08 of the Wisconsin Statutes, if the defendant files an affidavit that he has good reason to and does believe that he cannot have a fair trial on account of the prejudice of the judge, the judge becomes disqualified. There is not even the requirement that the party set forth in affidavit form the basis of his belief.

So far as any claim that a fair trial could not be had in Sheboygan County, Section 356.03 of the Wisconsin Statutes provides that if a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue to an adjoining county. In addition to those safeguards, the history of the Supreme Court of the State of Wisconsin indicates that it has been very zealous in requiring that defendants charged with crimes have fair trials. Practically all courts in this country have now become exceedingly aware of the jealousy with which the United States Supreme Court requires that defendants' rights be protected and that defendants in criminal cases have fair trials. This Court does not believe, cannot assume and is not in a position to hold that the state courts would ignore defendant's right to a fair trial. There is nothing in the record to justify any such assumption. The trial examiner of the National Labor Relations Board has apparently been holding hearings in Sheboygan for some time. No doubt had he been aware of any prejudice, that would be indicated by the record. If any of the parties had any concrete evidence one way or the other of any such community prejudice, no doubt it would have been put before the Court.

## VIII.

Respondent contends that the enforcement of the subpoena would deny him his rights as a citizen of Michigan and interfere with the prerogatives of the Governor of Michigan. No authority is filed in support of these contentions. The respondent is presumed to be innocent of any crime of which he is charged and presumably if he
45 stands trial will receive a fair trial and not be found guilty unless proven guilty beyond a reasonable doubt. We know of no authority in the Constitution or by any Act of Congress or by any law of the state of Michigan which provides that a citizen of Michigan, while in the state of Michigan, is immune from facing trial on a criminal charge in any other state in the union. On the contrary, Article IV, Section (2) of the Constitution reads as follows so far as is material here:

> "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

The enforcement of a subpoena has nothing to do with the extradition proceedings. The Constitution does not guarantee any right of asylum to any person to avoid having to stand trial if regularly indicted or charged with a felony in another state.

In *Mahon* v. *Justice*, 127 U. S. 700, a fugitive from Kentucky was illegally and forceably brought back from West Virginia into Kentucky. He claimed that his constitutional rights and the laws of the United States had been violated by his arrest and imprisonment in this manner. The court did not sustain that contention. There is nothing in the Act under consideration which would grant an exception to the power of subpoena on account of the fact that the witness is under indictment or charged with a crime in the state which the subpoena would require him to enter. One would be most loathe to believe that the Congress ever so intended. Such intention would be so contrary to the constitutional provision above stated that it should not be lightly indulged in. As stated in *Downing* v. *Schmidt*, 4 F. Supp. 1:

> "* * * the duty of the Governor, when a requisition

is presented, is ministerial and not discretionary, and is described as imperative, though, in the absence of state statute, there is no power to compel the executive to act."

See also *Kentucky* v. *Dennison*, 24 How. 66, 106-107.

## IX.

The final contentions of the respondent are that he is a defendant in a criminal proceedings and is thus immune from civil process, and that he is in the custody of the state of Michigan.

46 No authority has been cited to the effect that a defendant in a situation such as is presented by this case is immune from service of a Federal subpoena. The Court has been unable to find any.

In 24 Am. Jur., Process, Sec. 138, the following language is found:

> "* * * A person in custody on a criminal charge, whether before or after conviction, may be served with civil process."

Furthermore, it would seem that witnesses do not fall within the ordinary exemptions from civil process granted to parties.

> "While many persons and classes of persons are at certain times privileged and exempted from service of civil process, these privileges and the exemption from process do not ordinarily extend to exempt such persons from being compelled to attend and testify as witnesses in a trial." 58 Am. Jur., Witnesses, Sec. 15.

The last part of this contention is that the respondent is in the custody of the State of Michigan. No authority has been cited for the proposition that the fact that he has put up bond, no copy of which and the exact terms of which are not set forth in the record, for his appearance in Michigan in a Michigan court to answer the extradition proceedings to extradite him to Wisconsin makes him immune from the service of a subpoena or takes him out of the application of the Labor Relations Act. There is nothing in the Act to make an exception excepting such a person from service of subpoenas. One can only assume from this record that the sole purpose of the bond in

Michigan is that he will respond to the extradition proceedings if extradited. If he comes into the state of Wisconsin and is served with a criminal process here, the extradition proceedings would become moot. Its only object can be to try and compel his coming into Wisconsin to stand trial for whatever offense he is charged with if extradited. Nothing in the Act provides that the Governor of any state or the state court of any state can give any citizen of any state immunity from the lawful service of a subpoena by a body having the right under the laws of Congress to subpoena such a person as a witness. The Court requested all counsel to furnish authority on this contention. No authority has been found supporting such contention. None has been found by the Court. Respondent's counsel cited some decisions, none of which support this contention in the Court's opinion.

47 Counsel for the National Labor Relations Board is directed to prepare a proposed order in accord with this decision, sending copies of the proposed order to counsel for the other parties. Such counsel will have three (3) days in which to file any objection they may have as to the form of the proposed order.

Dated, Milwaukee, Wisconsin, this 21st day of November, 1955.

K. P. Grubb,
*U. S. District Judge.*

48 United States District Court.

* * (Caption—55-C-265) * *

## ORDER ENFORCING SUBPOENA AD TESTIFICANDUM.

(Filed Nov. 30, 1955. Dale E. Ihlenfeldt, Clerk.)

This matter having come on for hearing before the Court on the application of the National Labor Relations Board on relation of Kohler Co. for an order requiring respondent, John Gunaca, to obey and comply with a certain subpoena *ad testificandum*, and the Court, having on September 19, 1955, issued an order requiring the said John Gunaca to appear and show cause on October 3, 1955, why the said application of the National Labor Relations Board

should not be granted. Respondent filed an answer to the application of the National Labor Relations Board, and a motion to dismiss said application. And the parties announcing that there was no testimony to be offered, the Court has considered the pleadings, and the arguments and briefs of counsel, and being fully advised in the premises, and the Court having heretofore on the 21st day of November, 1955, signed its decision herein, it is now, therefore,

Ordered, Adjudged and Decreed that the motion to dismiss this proceeding, filed by respondent, John Gunaca, be, and the same hereby is denied.

It Is Further Ordered, Adjudged and Decreed that the application of the National Labor Relations Board on relation of the Kohler Company for an order requiring John Gunaca, respondent herein, to obey and comply with a subpoena *ad testificandum*, be, and the same hereby is granted, and the said John Gunaca be and he hereby
49 is directed to appear before Trial Examiner George A. Downing in the Circuit Court Room, County Court House, at Sheboygan, Wisconsin, on a date to be fixed by said Trial Examiner, and then and there give testimony and answer any and all questions relevant and material to the matter under investigation and in question in the proceedings now pending before the National Labor Relations Board styled *In the Matter of Kohler Company, et al.*, Case No. 13-CA-1780, in accordance with the subpoena, a copy of which is attached to the application herein.

Dated, Milwaukee, Wisconsin, this 30th day of November, 1955.

K. P. Grubb,
*U. S. District Judge.*

50 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

National Labor Relations Board, on Relation of Kohler Co., *Applicant,*
vs.
John Gunaca, *Respondent.*
No. 55 C 265.

## NOTICE OF APPEAL.

(Filed Dec. 20, 1955. Dale E. Ihlenfeldt, Clerk.)

Notice is hereby given that John Gunaca, Respondent and Appellant above-named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the Order of the United States District Court enforcing Subpoena Ad Testificandum entered by the Honorable K. P. Grubb, District Judge, on the 30th day of November, A. D., 1955.

Dated at Detroit, Michigan, this 16th day of December, A. D., 1955.

Rothe, Marston, Mazey, Sachs & O'Connell,

By /s/ D. Charles Marston,
*Attorneys for Respondent,*
3610 Cadillac Tower,
Detroit 26, Michigan,
WOodward 5-3464.

51 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-265) * *

## UNDERTAKING.

(Filed Dec. 20, 1955. Dale E. Ihlenfeldt, Clerk.)

Whereas an Order enforcing Subpoena Ad Testificandum was signed and entered in the above entitled matter by the Honorable K. P. Grubb, Judge of the United States District Court on the 30th day of November, 1955, and the Respondent feeling aggrieved thereby intends to appeal therefrom,

Now Therefore, the undersigned does hereby, pursuant to the Statutes in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal, not exceeding Two Hundred Fifty Dollars ($250.00).

Dated at Milwaukee, Wisconsin, December 20, 1955.

National Surety Corporation,
By Joseph J. Hayes,
(Seal) *Attorney in Fact.*

52 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—55-C-265) * *

## DESIGNATION OF THE RECORD ON APPEAL.

(Filed Dec. 22, 1955. Dale E. Ihlenfeldt, Clerk.)

To: The Clerk of the United States District Court for the Eastern District of Wisconsin:

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, respondent-appellant designates the following portion of the record to be contained in the record on appeal in the above entitled action to the United States Court of Appeals, Seventh Circuit:

1. Order to Show Cause.
2. Application for Order Requiring Obedience to Subpoena Ad Testificandum.
3. Attached to 2, Exhibits A, B, C-1 through C-4, and D-1 through D-14.

4. Answer to Order to Show Cause.
5. Motion to Dismiss Order to Show Cause.
6. Attached to 5, Exhibit A.
7. Opposition to Motion to Dismiss Order to Show Cause.
8. Opinion of Court.
9. Order Enforcing Subpoena Ad Testificandum.
10. Notice of Appeal.
11. Undertaking.
12. This Designation.

Dated December 21st, 1955.

Rothe, Marston, Mazey, Sachs
& O'Connell,
By D. Charles Marston,
*Attorneys for Respondent-Appellant,*
3610 Cadillac Tower,
Detroit 26, Michigan,
Woodward 5-3464.

53 CERTIFICATE OF CLERK.

United States of America,
Eastern District of Wisconsin. } ss:

I, Dale E. Ihlenfeldt, Clerk of the District Court of the United States of America for the Eastern District of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, with their originals now on file and remaining of record in my office, and that they are true copies of the pleadings, Order enforcing subpoena ad testificandum, and other papers in the case of National Labor Relations Board, on Relation of Kohler Company *vs.* John Gunaca, Civil No. 55-C-265.

In Testimony Whereof, I have hereunto set my hand and duly affixed the seal of said court at the City of Milwaukee, in said district, this 22nd day of December, in the year of our Lord, 1955, and of the Independence of the United States, the 180th.

Dale E. Ihlenfeldt,
*Clerk.*

(Seal)

[fol. 54] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1955, JANUARY SESSION, 1956

No. 11641

NATIONAL LABOR RELATIONS BOARD, ON THE RELATION OF KOHLER CO., Applicant-Appellee

vs.

JOHN GUNACA, Respondent-Appellant

Appeal from the United States District Court for the Eastern District of Wisconsin

OPINION—February 24, 1956

Before Major, Lindley and Swaim, Circuit Judges

MAJOR, Circuit Judge:

This proceeding was instituted in the United States District Court for the Eastern District of Wisconsin by the National Labor Relations Board at the request of Kohler Co., to enforce a subpoena ad testificandum previously issued to the respondent Gunaca by a trial examiner of the Board. From an order of the District Court allowing enforcement of the subpoena, the appeal comes to this court. The order under attack was entered by District Judge K. P. Grubb, following the rendition of a well reasoned opinion. *National Labor Relations Board, on Relation of Kohler Co., Applicant* v. *John Gunaca, Respondent,* 135 F. Supp. 790.

The issues urged as reasons for reversal are substantially the same as those presented and considered in the court below. The opinion of Judge Grubb contains an adequate statement of the facts, the issues and the court's reasoning in response thereto. After a careful study of his opinion, we are satisfied that his reasoning is sound and that the correct result was reached. This being the situation, no good purpose could be served in a discussion [fol. 55] by us of the same issues. We, therefore, adopt the opinion of the District Court, supplemented by a brief

discussion relative to the issue of venue and jurisdiction over the person of respondent.

This supplementation appears to be in order by reason of respondent's strong reliance upon *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, which respondent contends requires a reversal. The Robertson case was not mentioned in the District Court and, insofar as the record discloses, has been cited and relied upon for the first time in this court. It is true there is similarity between the facts of Robertson and those here but that is as far as the similarity extends. In that case the Railroad Labor Board invoked the aid of a District Court in the Northern District of Illinois to obtain by subpoena the presence in that court of respondent, a resident and inhabitant of the Northern District of Ohio. The question for decision was whether the District Court acquired jurisdiction over the respondent. Admittedly, Congress had not conferred express jurisdiction, but it was argued by the Board that it had impliedly done so. The court rejected this contention and reversed the District Court, which had held adversely to the respondent.

The importance here of Robertson resides in the fact that the Supreme Court recognized that Congress had the power to authorize the bringing of a suit in any District Court and to provide that process run into every part of the United States. Thus, the court stated (Page 622):

> "Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior federal court. Congress has power, likewise, to provide that the process of every district court shall run into every part of the United States."

The court, however, on the same page pointed out that Congress had not done so under the Act there relied upon, that is, the Transportation Act of 1920, and that was the sole reason for reversal.

In contrast, Congress has under the National Labor Relations Act exercised the power which the Supreme Court in Robertson held it possessed by providing for the issuance of a subpoena upon application by the Board to any District Court "within the jurisdiction of which the inquiry

is carried on or within the jurisdiction of which said person [fol. 56] guilty of contumacy or refusal to obey is found or resides or transacts business." In the instant case the inquiry was being carried on in the Wisconsin jurisdiction and, under the specific language of the statute, the Wisconsin court had jurisdiction to entertain the Board's application. This plain statutory grant cannot be cast aside, as respondent appears to argue, because the Board was also authorized to make application to a District Court of Michigan.

Congress having bestowed venue upon the District Court of Wisconsin, at the same time provided the means of obtaining jurisdiction over the person of respondent by providing for service of process upon him in Michigan, the jurisdiction in which he resided and was found.

The order appealed from is

Affirmed.

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[fol. 57] In United States Court of Appeals for the Seventh Circuit

No. 11641

National Labor Relations Board, on the Relation of Kohler Co., Applicant-Appellee,

vs.

John Gunaca, Respondent-Appellant

Appeal from the United States District Court for the Eastern District of Wisconsin

Before Hon. J. Earl Major, Circuit Judge; Hon. Walter C. Lindley, Circuit Judge; Hon. H. Nathan Swaim, Circuit Judge

Judgment—February 24, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by

this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.

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[fol. 58] In United States Court of Appeals

[Title omitted]

Order Denying Petition for Rehearing—March 30, 1956

It is ordered by the Court that the Petition for a Rehearing of this cause be, and the same is hereby, Denied.

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[fol. 59] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 60] In Supreme Court of the United States, October Term, 1955

No. 922

[Title omitted]

Order Allowing Certiorari—Filed June 11, 1956

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. The Solicitor General is invited to file a brief expressing the views of the National Labor Relations Board.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

5/15

No. 922 77

MAY 3 1956
HAROLD B. WILLEY, Cl

IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1955**

JOHN GUNACA,

*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD, ON THE RELATION OF KOHLER CO.,

*Respondent*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

JOSEPH L. RAUH, JR.,
JOHN SILARD,
*1631 K Street, N. W.,*
*Washington 6, D. C.,*
*Attorneys for Petitioner.*

*Of Counsel:*

HAROLD A. CRANEFIELD,
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*3610 Cadillac Tower*
*Detroit 26, Michigan.*

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IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1955**

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# No.

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JOHN GUNACA,

*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD, ON THE RELATION OF KOHLER CO.,

*Respondent*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioner, John Gunaca, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

### Opinions Below

The opinion of the District Court is reported at 135 F. Supp. 790. The opinion of the Court of Appeals has not yet been reported. Both opinions are printed in Appendix A, *infra*, pp. 13 to 31.

## Jurisdiction

The Judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 24, 1956, and a timely petition for rehearing was denied on March 30, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## Questions Presented

1. Petitioner, a resident of Detroit, Michigan, was served with a National Labor Relations Board subpoena, issued at the request of a private employer, to testify at an unfair labor practice hearing in Wisconsin. Petitioner asserted, through his counsel, before the trial examiner and the District Court that he was subject to arrest in Wisconsin on a criminal charge and that the employer requesting the subpoena did so only in order that petitioner would be arrested there, knowing that he could give no relevant testimony in the pending hearing. There was no showing of relevancy of petitioner's testimony before the examiner or the District Court. Petitioner offered to testify in available deposition proceedings in Detroit, where he resided and worked. Under these circumstances, was there abuse of judicial discretion in enforcement of an oppressive subpoena?

2. Whether the power to rule on a petition for the revocation of a subpoena, a power vested by the Labor-Management Relations Act in the National Labor Relations Board, may be delegated by the Board to a trial examiner.

3. Whether, over objection of the subpoenaed witness, the venue of judicial proceedings to enforce an NLRB subpoena may properly be laid in Wisconsin where the administrative hearing is in progress, rather than in Michigan, where the witness resides and works.

## Statute Involved

The statutory provisions involved are Sections 11(1), (2) and (5) of the Labor-Management Relations Act of 1947, 61 Stat. 150, 29 U.S.C. 161(1), (2) and (5). They are printed in Appendix B, *infra*, p. 32.

## Statement

This case arises out of the much-publicized strike at the Kohler Company plant in Sheboygan, Wisconsin, and the unfair labor practice charges filed by the United Automobile Workers against the Kohler Company (R. 4).

On August 5, 1955, during the course of the hearing on these unfair labor practice charges before a trial examiner of the National Labor Relations Board, the Kohler Company requested, and the NLRB issued, a subpoena directing petitioner to appear in Sheboygan, Wisconsin, and testify at the hearing there (R. 6). The subpoena requiring petitioner to appear before the trial examiner in Sheboygan, Wisconsin, was served on petitioner in Detroit, Michigan, where he had been residing for several years (R. 24).

On August 18, 1955, petitioner, appearing specially through his attorney before the trial examiner in Wisconsin (R. 4, 12-19), filed a petition for the revocation of the subpoena (R. 8-11). The petition for revocation and the statements of counsel in support of the petition for revocation set forth the facts on which this petition for certiorari is based.

Petitioner is charged with felonious assault by the State of Wisconsin (R. 14). On September 17, 1954, the Governor of Wisconsin requested the Governor of Michigan to extradite petitioner to Wisconsin (R. 9). Petitioner was arrested promptly, but released on bond pending a decision on extradition (R. 9). At the extradition hearing before the

office of the Governor of Michigan, petitioner requested the withholding of the extradition warrant pending the determination of the labor dispute between the Kohler Company and the United Automobile Workers on the ground that a fair trial was not possible in Wisconsin due to "the malicious and wilful incitation of the people by the Kohler Company management" (R. 9). The Governor of Michigan has withheld the issuance of the warrant of extradition (R. 10).

Petitioner asserted in his petition to revoke the subpoena that to require him to go to Wisconsin would, by "subterfuge and indirection", deprive petitioner of his rights (R. 10); that the request for the subpoena by the Kohler Company was "maliciously, unjustly and unfairly motivated" (R. 11); "that the request [for the subpoena] was made not for the purpose of presenting any further facts or evidence to assist the Board in its duties because the Company and its representatives and agents are well aware that your petitioner's testimony is not material or relevant to the hearing" (R. 11); "that the Company agent . . . is using the Board processes for purposes other than those which are connected with the hearings before the Board" (R. 11). Counsel for petitioner answered "yes" to the trial examiner's question whether it was his view "that this is simply a subterfuge to get him [petitioner] here to bring him to trial on the Wisconsin charge" (R. 14) and subsequently went on to say that "this is an indirect way of achieving something that the Kohler Company and the State of Wisconsin cannot achieve constitutionally" (R. 18).

In addition to challenging the good faith of the Kohler Company in requesting the subpoena from the Board, petitioner asserted that his testimony would not be relevant in any manner to the issues before the trial examiner (R. 11, 15); and that, as a man of humble means (R. 10), it would

be a great hardship upon him to jeopardize his employment in Detroit and require him to travel a great distance to the place of the hearing (R. 10, 14). Finally, petitioner offered to testify by deposition in Detroit as authorized by the rules of the Board (R. 10, 14). Petitioner asserted that, under all the above circumstances, to compel his appearance in Wisconsin, would constitute a subversion of the subpoena powers of the Board and an oppressive and unjust utilization of its authority (R. 10-11, 18).

The trial examiner turned a deaf ear to all these assertions. His answer to the suggestion of the availability of a deposition proceeding was that, "It is not used very often" (R. 14). His answer to the contention that petitioner's testimony would not be relevant to the issues before the Board was that "on representation of counsel . . . the witness will be called upon to give testimony which is or may be relevant to the issues" (R. 15).[1] His answer to petitioner's various contentions that the subpoena was oppressive was that petitioner was raising "questions which appear to me are appropriate for disposition in some other tribunal . . . It is a matter that can ultimately be resolved by the federal judge" (R. 17). Finally, in answer to the suggestion that this was an indirect way of extraditing petitioner, the trial examiner replied that "I do not think there is any question I can rule on here" (R. 18).

The petition for revocation of the subpoena was denied

[1] The examiner's conclusion in this respect was based solely on a vague claim of relevancy by counsel for the Kohler Company, not under oath, and contrary to petitioner's petition for revocation and the statements of his counsel (R. 11, 15). This vague claim of relevancy was as follows: "Mr. Conger: Mr. Gunaca, we expect to show, was sent here as an agent of the union, participated in the strike activities, and the picketing activities which we claim are illegal and we intend to show by Mr. Gunaca's testimony a direct connection between certain illegal activities which the union has disavowed and the fact that there is a connection between those activities and the union" (R. 15).

by the trial examiner (R. 18). Petitioner, fearing arrest in Wisconsin, did not comply with the subpoena (R. 5). The NLRB applied to the District Court for the Eastern District of Wisconsin for an order requiring obedience to the subpoena (R. 3), and on September 19, 1955 an order to show cause was issued (R. 2). On November 21, 1955, the District Judge upheld the subpoena (R. 27-38; pp. 17 to 31, *infra*) and on November 30, 1955, he entered an order requiring petitioner to obey and comply with the subpoena (R. 38-39). The District Judge refused to determine whether petitioner's testimony would be relevant or material in the Sheboygan hearing, stating that "there is no showing in this record . . . such as to move the Court to substitute its judgment on the question for the judgment of the Board or its examiner who has seen and heard the witnesses and is thoroughly familiar with the record" (R. 33). The District Judge rejected petitioner's contentions that the subpoena was oppressive without even referring to petitioner's challenge of the Kohler Company's good faith in seeking the subpoena or weighing the oppressive nature of the subpoena upon petitioner against the inconvenience to the Company if the deposition alternative were adopted (R. 34-38, pp. 26 to 31, *infra*). The Court of Appeals for the Seventh Circuit affirmed the District Court decision on the oppressive nature of the subpoena without discussion, adopting the opinion of the District Court as its own (see p. 14, *infra*).

## Reason for Granting the Writ

*The decision of the Court of Appeals in failing to direct the District Court to determine for itself the question whether in all the circumstances of this case the subpoena issued to petitioner should have been revoked as oppressive conflicts with the applicable decisions of this Court and constitutes an important question of Federal law involving the abuse of Federal process.*

1. Petitioner made a timely assertion before the trial examiner of the National Labor Relations Board that the subpoena was oppressive. In support of his petition to revoke the subpoena, petitioner asserted that the purpose of the Kohler Company in requesting the subpoena was to force him into Wisconsin to face charges for felonious assault, that he had no relevant evidence to give at the Board hearing there, that the travel to Wisconsin and the placing in jeopardy of his employment would be a great hardship and expense to him, and that there was an alternate method of obtaining any possible relevant testimony through deposition proceedings in Detroit. The trial examiner refused to weigh these considerations and determine whether, under all the circumstances, the subpoena was oppressive. Having stated that petitioner's testimony "is or may be relevant to the issues"[2] (R. 15), the examiner held that mainly petitioner raised "questions which appear to me are appropriate for disposition in some other tribunal" and "can ultimately be resolved by the federal judge" (R. 17). The failure of the trial examiner to examine into the petitioner's contention that the purpose of the subpoena was not to obtain evidence, but rather to remove petitioner to Wisconsin for trial on criminal charges there and his failure to weigh the hardship to petitioner

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[2] See n. 1, p. 5, *supra*.

under all the circumstances against the inconvenience to the Company of having the proceedings held by deposition in Detroit was a clear violation of his duty. *Cf. Harriman* v. *Interstate Commerce Commission*, 211 U.S. 407; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298. Although the examiner conceded that "subpoenas may be revoked if they are oppressive" (R. 17), he refused to consider that question despite the factors which petitioner adduced to demonstrate the oppressive nature of the subpoena.[3]

2. It was the obligation of the District Court, in a proceeding to enforce the subpoena, to determine for itself whether petitioner had any relevant testimony to give the National Labor Relations Board.[4] This, however, the District Court refused to do. The refusal of the District Court to determine the question of relevance clearly conflicts with the decisions of this Court that, when objection is made by the subpoenaed witness, a showing of relevance is a condition of judicial enforcement. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208-9; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479, 490.[5] In view of petitioner's assertion that the subpoena was a mere subterfuge to force him into Wisconsin for arrest, it was doubly important that the Court assure itself that there was in fact relevant evidence sought by the Kohler Company through petitioner's testimony.

In supporting its refusal to determine the relevance of

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[3] Although we do not rely on the Board's delegation of the revocation power as a ground for granting the writ here, it is certainly worth noting that this trial examiner, at least, failed to exercise the delegated authority with the care and deliberation that might have been expected of the Board itself on so important a matter.

[4] See 29 U.S.C. 161(1) and (2), *infra*, pp. 32 to 33.

[5] This Court has held to the same effect where Congressional or Grand Jury subpoenas were involved. See *McGrain* v. *Daugherty*, 273 U. S. 135, 176; *Hale* v. *Henkel* 201 U. S. 43, 77

petitioner's testimony, the District Court stated that "there is no showing in this record . . . such as to move the Court to substitute its judgment on the question for the judgment of the Board or its examiner who has seen and heard the witnesses and is thoroughly familiar with the record" (R. 33, pp. 24-25, *infra*). But the examiner nowhere implied that the record or witnesses in the pending hearings supported his judgment as to relevance. On the contrary, it is clear that the examiner exercised no judgment at all on this issue and had no evidence before him upon which to support a judgment. He relied solely, as he himself indicated, on the bare "representation of counsel" (R. 15) for the Kohler Company.[6] If a bare allegation of counsel is a sufficient showing of relevance, this Court's assertion that lack of relevance is an appropriate defense to enforcement is rendered meaningless, for the subpoenaed witness cannot refute undisclosed facts. Certainly the examiner's duty to inquire into relevance was not satisfied by his accepting a self-serving conclusion of counsel for one side on this point. What is required is not a general claim, but some actual showing of relevance. *Cf. Hale* v. *Henkel*, 201 U. S. 43, 77; *Overholser* v. *DeMarcos*, 149 F. 2d 23 (C.A. D.C. 1945) *cert. den.* 325 U. S. 889. Of that there was none before either the District Court or the examiner.

3. Over and above the question of relevance, however, the District Court refused to weigh the oppressive character of the subpoena under all the circumstances. Even if there had been an adequate showing of relevance, which there was not, it was the obligation of the District Court to insure that the subpoena was not being utilized for the ulterior purpose of forcing petitioner into the State of Wisconsin for trial on criminal charges. Courts may not enforce subpoenas sought for unauthorized purposes. *Oklahoma*

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[6] See n. 1, p. 5, *supra*.

*Press, supra,* at 208-9; *Hale* v. *Henkel, supra,* at 65; *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407. "The citizen . . . has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer." *Jones* v. *Securities and Exchange Commission,* 298 U.S. 1, 26.

The District Court's action in this respect is all the more strained for it examined into the question, on its own motion and without factual support, whether petitioner could have a fair trial in Wisconsin (R. 35, p. 27, *infra*). Apparently the District Court assumed, as charged throughout this proceeding, that the subpoena would result in petitioner being arrested and tried in Wisconsin. It is no answer for the District Court to suggest that petitioner may in fact receive a fair trial in Wisconsin; that is a matter for the Governor of Michigan to determine on extradition proceedings. NLRB subpoenas are not an authorized method by which persons may be compelled to return to a state for trial, whether such a trial would be fair or unfair. The ulterior purpose of the Kohler Company is not cured by the possibility that it will not result in a miscarriage of justice, for even legitimate ends cannot justify unlawful means. That is the essence of the guaranty of procedural due process.

At no stage in this proceeding—before the trial examiner, before the District Court, or before the Court of Appeals—was petitioner's charge concerning the oppressive nature of the subpoena weighed and rejected. In view of his assertions as to the ulterior purpose for which the subpoena was sought by a highly antagonistic private party and that the subpoena was burdensome for other reasons as well, petitioner was at least entitled to have the alternative of deposition proceedings considered prior to enforcement action. "The gist of the protection [of the Fourth Amendment] is in the requirement, ex-

pressed in terms, that the disclosure sought shall not be unreasonable." *Oklahoma Press, supra,* at 208; see *Walling* v. *American Rolbal Corp.,* 135 F. 2d 1003 (C.A. 2, 1943). Yet the Court of Appeals without discussion adopted the District Judge's opinion that if Congress had desired courts not to enforce oppressive subpoenas it would have provided by statute "that a deposition be substituted for personal attendance" (R. 35, p. 27, *infra*).

What the courts below neglect is that such a narrow interpretation of the power of the District Court under the statute renounces that discretion in subpoena enforcement upon which its very jurisdiction to enforce is bottomed. *Interstate Commerce Commission* v. *Brimson, supra;* see dissenting opinion of Justices Frankfurter and Jackson in *Penfield Co.* v. *Securities and Exchange Commission,* 330 U. S. 585, 604. Courts cannot be "rubber stamps" for arbitrary or burdensome administrative subpoenas. The District Court's refusal to weigh the oppressiveness of the subpoena or to consider the availability of deposition proceedings as an alternative to enforcement would constitute abuse of judicial discretion in any circumstances. But where, as here, the trial examiner has specifically refused to consider the alternative of deposition proceedings or the oppressiveness of the subpoena, the Court's "rubber stamp" action deprives petitioner not only of judicial process, but due process as well.

4. In summary, we respectfully submit: In view of the situation in Wisconsin with the Kohler Company seeking the subpoena in order to obtain the arrest of petitioner there, in view, at the very least, of the serious issue concerning the relevance of petitioner's testimony, in view of the hardship to him from the point of view of expense and employment of going to Wisconsin, the examiner and the District Court should have weighed the oppression of enforcement upon petitioner against the inconvenience to the Com-

pany of having a deposition proceeding in Detroit, Michigan. The failure to do this constituted a failure to consider petitioner's claim that the subpoena was oppressive, contrary to the applicable decisions of this Court. It is respectfully submitted that this is an important question of Federal law warranting the issuance of a writ of certiorari.

Respectfully submitted,

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MAY, 1956.

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## Appendix A

IN THE

## UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OCTOBER TERM, 1955, JANUARY SESSION, 1956

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Appeal from the United States District Court for the Eastern District of Wisconsin

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No. 11641

NATIONAL LABOR RELATIONS BOARD, ON THE RELATION OF KOHLER CO., *Applicant-Appellee,*

*v.*

JOHN GUNACA, *Respondent-Appellant*

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February 24, 1956

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Before MAJOR, LINDLEY and SWAIM, *Circuit Judges.*

MAJOR, *Circuit Judge.* This proceeding was instituted in the United States District Court for the Eastern District of Wisconsin by the National Labor Relations Board at the request of Kohler Co., to enforce a subpoena ad testificandum previously issued to the respondent Gunaca

by a trial examiner of the Board. From an order of the District Court allowing enforcement of the subpoena, the appeal comes to this court. The order under attack was entered by District Judge K. P. Grubb, following the rendition of a well reasoned opinion. *National Labor Relations Board, on Relation of Kohler Co., Applicant* v. *John Gunaca, Respondent,* 135 F. Supp. 790.

The issues urged as reasons for reversal are substantially the same as those presented and considered in the court below. The opinion of Judge Grubb contains an adequate statement of the facts, the issues and the court's reasoning in response thereto. After a careful study of his opinion, we are satisfied that his reasoning is sound and that the correct result was reached. This being the situation, no good purpose could be served in a discussion by us of the same issues. We, therefore, adopt the opinion of the District Court, supplemented by a brief discussion relative to the issue of venue and jurisdiction over the person of respondent.

This supplementation appears to be in order by reason of respondent's strong reliance upon *Robertson* v. *Railroad Labor Board,* 268 U. S. 619, which respondent contends requires a reversal. The Robertson case was not mentioned in the District Court and, insofar as the record discloses, has been cited and relied upon for the first time in this court. It is true there is similarity between the facts of Robertson and those here but that is as far as the similarity extends. In that case the Railroad Labor Board invoked the aid of a District Court in the Northern District of Illinois to obtain by subpoena the presence in that court of respondent, a resident and inhabitant of the Northern District of Ohio. The question for decision was whether the District Court acquired jurisdiction over the respondent. Admittedly, Congress had not conferred express jurisdiction, but it was argued by the Board that

it had impliedly done so. The court rejected this contention and reversed the District Court, which had held adversely to the respondent.

The importance here of Robertson resides in the fact that the Supreme Court recognized that Congress had the power to authorize the bringing of a suit in any District Court and to provide that process run into every part of the United States. Thus, the court stated (page 622):

> "Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior federal court. Congress has power, likewise, to provide that the process of every district court shall run into every part of the United States."

The court, however, on the same page pointed out that Congress had not done so under the Act there relied upon, that is, the Transportation Act of 1920, and that was the sole reason for reversal.

In contrast, Congress has under the National Labor Relations Act exercised the power which the Supreme Court in Robertson held it possessed by providing for the issuance of a subpoena upon application by the Board to any District Court "within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business." In the instant case the inquiry was being carried on in the Wisconsin jurisdiction and, under the specific language of the statute, the Wisconsin court had jurisdiction to entertain the Board's application. This plain statutory grant cannot be cast aside, as respondent appears to argue, because the Board was also authorized to make application to a District Court of Michigan.

Congress having bestowed venue upon the District Court

of Wisconsin, at the same time provided the means of obtaining jurisdiction over the person of respondent by providing for service of process upon him in Michigan, the jurisdiction in which he resided and was found.

The order appealed from is

AFFIRMED.

UNITED STATES DISTRICT COURT

(Caption—55-C-265)

OPINION

(Filed Nov. 22, 1955. Dale E. Ihlenfeldt, Clerk.)

This matter is before the Court on an order to show cause by the applicant why an order should not be entered requiring the respondent to obey a certain subpoena ad testificandum issued by the Board and served on the respondent.

The record shows that in connection with a proceedings before a National Labor Relations Board examiner on the question of an unfair labor practice the relator requested and the trial examiner of the Board issued a subpoena to the respondent which was duly served upon him calling upon him to attend a hearing before the trial examiner of the Board at Sheboygan, Wisconsin, on August 18, 1955. At the time of the return of the subpoena respondent appeared by an attorney (he stated he was making a special appearance), and filed a petition to revoke the subpoena. This was heard by the trial examiner who denied the petition to revoke the subpoena. In the proceedings before the examiner, and here, many contentions are urged.

The record discloses that the respondent is a resident of Detroit, Michigan. It further discloses that a warrant for the arrest of the respondent on a charge of a felonious assault was issued in Sheboygan County, Wisconsin; that request was made for the extradition of the respondent from the state of Michigan to answer that charge; that the Governor of Michigan has not granted extradition as of the time of the hearing in this matter, but that respondent did post bond with a state court in Michigan. The terms of this bond are not shown by the record, but it can only be assumed from the record that the bond is conditioned upon

his appearance if extradition is granted. The respondent claims that he would be unable to get a fair trial if he were to come to Wisconsin to answer the charges.

38 The Court will take up the various contentions of the respondent which are as follows:

I

Respondent contends that the venue in this proceeding is incorrect and that it should have been brought in the District Court in Michigan. Title 29, U. S. C. A., Sec. 161 (1) provides that the Board or any member thereof shall upon application of any party to proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or production of evidence.

> "Such attendance of witnesses * * * may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

Congress could not have used broader language with reference to the geography. Subsection (2) provides that in case of contumacy or refusal to obey a subpoena

> "* * * any District Court of the United States * * within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found * * upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce the evidence if so ordered * * *"

The plain language of the statute gives to the Board the right to bring this proceedings in either the District Court within the jurisdiction of which the inquiry is being carried

on or within which such person is found or resides. The city of Sheboygan is within the jurisdiction of the Eastern District of Wisconsin. Respondent has cited no decisions nor has the Court been able to find one holding that the quoted language means other than what it says.

II

Respondent contends that this Court has no jurisdiction over the person of the defendant. The provisions above quoted also seem on their face to answer that contention. Subsection (5) specifically provides:

> "All process of any court to which application may be made under sections 151-166 of this title may be served in the judicial district wherein the defendant or other person required to be served resides or may be found."

That language is not susceptible of any holding that the process of the Court in this proceedings is confined to the Court's district. Again, no decision has been cited, or found by the Court, limiting such language.

> 39 "Congress may authorize the civil process of a Federal District Court to be served on persons in any other district." *Continental Bank* v. *Rock Island Railway,* 294 U. S. 648, 683.

III

The contention is made that even if process of this Court reached into Michigan, this Court could not punish a Michigan resident for contempt, in other words, could not enforce the process. Title 29, U. S. C. A., Sec. 161 (2) above quoted, in addition to giving the Court power to issue an order requiring such person to appear before the Board or its agent, expressly provides:

> "* * * any failure to obey such order of the court may be punished by said court as a contempt thereof."

Here again is an express provision in the Act of Congress not susceptible in the Court's opinion to any interpretation other than just what it states. Counsel have cited no decisions to the contrary.

In *N. L. R. B.* v. *Hearst*, 102 F. 2d 658 (CCA 9), the court said in answer to a contention that valid service could not be made outside the judicial district fixed by the Board in which the unfair labor practice occurred:

> "The contention is based on an alleged lack of geographic reach. * * * the act specifically permits the Board to designate the place of hearing, Sec. 10 (b), which implies that service can be made anywhere in the United States. Since 'Congress may authorize the civil process of a Federal District Court to be served upon persons in any other district' * * *, it has power, we think, to authorize service by this act anywhere within the United States."

## IV

Respondent contends that the Board itself must act on the issuance and revocation of a subpoena before the Court can enforce such subpoena. This claim is based upon the position that the Board cannot delegate its powers of issuance and revocation of subpoenas.

This contention presents a close question and one upon which there has been disagreement. Thus, in *N. L. R. B.* v. *International Typographical Union*, 76 F. Supp. 895, when the matter was presented to District Judge Medina, he held that the power could be delegated. He placed great stress upon the Administrative Procedure Act, 5 U. S. C. A. Sec. 1001, et seq. His decision seems to this Court to be logical

and reasonable. He points out that if the Act were to
40 be interpreted otherwise and without reference to Section 7 (b) of the Administrative Procedure Act.

"* * * the result might well be a most burdensome and unnecessary deluge of motions to revoke subpoenas and the Board, in many if not most cases, would find it impossible to determine such motions on the merits without procuring lengthy transcripts of proceedings before trial examiners, together with copies of voluminous documents and exhibits. In the absence of clear language to that effect, it is not to be supposed that the Congress intended to involve the National Labor Relations Board in such a morass of procedural detail."

We next find the matter considered by the Seventh Court of Appeals in *N. L. R. B.* v. *Barnes, et al.*, 178 F. 2d 156. The court there stated, among other things:

"However, if we are to determine the intent of Congress, we must go further than an investigation of the language of the particular section of the Act. We must consider the Act as a whole, its various provisions, its purpose, what Congress expected the National Labor Relations Board to accomplish under the Act, and its legislative history.

"The mere fact that certain sections of this Act authorize the delegation of certain powers by the Board has not been generally construed as depriving the Board of the power to delegate certain other powers, the delegation of which is not expressly authorized."

* * * * *

"By Section 5 of the Act, the Board was given the power 'by one or more of its members or by such agents

or agencies as it may designate, (to) prosecute any inquiry necessary to its functions in any part of the United States.' The issuance of subpoenas is a necessary incident to the power to investigate and prosecute."

While it may not have been necessary to the decision of the case, the court thereafter said this with reference to the matter of revocation of subpoenas:

"If we were to adopt the restrictive construction of this section for which the respondents contend, we would necessarily be compelled to also hold that all such petitions must be submitted to the Board and must be acted on by not less than three members of the Board. This would necessarily require sending to the Board sufficient information concerning the matters under investigation to make it possible for the Board to intelligently pass upon such petition.

"If we were to hold that the Board, or one of its members, must personally do every act essential to the execution and issuance of each subpoena in every proceeding being conducted under this Act throughout the United States and its Territories, and that the Board must then, as a Board, pass upon every petition for the revocation of any subpoena, it would be physically impossible for the Board and its members to perform the many other more important duties which they are required to perform to accomplish the purpose of the Act."

Neither of the above decisions has been reversed or overruled so far as the Court has been able to ascertain.

41 There is one decision holding to the contrary, that of District Judge Hall in *N. L. R. B.* v. *Pesante*, 119 F. Supp. 444. In this case Judge Hall, mainly by an analysis

of the statute and the amendments to it and without regard to the Administrative Procedure Act and without regard to the practical effect of such holding, decides directly contrary to the previous two cases. The reasoning of the *International Typographical Union* and the *Barnes* cases appeals to this Court more than that in the *Pesante* case. It would seem to this Court that one should be very slow to presume that the Congress intended to enact a statute which would require a review of testimony possibly two or three thousand miles from the place where testimony was taken after having it transcribed with all the attendant delays and expense in proceeding before the N. L. R. B. that would be involved. Such construction would make it impossible as a practical matter for the N. L. R. B. to carry out its functions. Certainly they couldn't carry them out expeditiously as Congress no doubt intended. Labor peace or proper labor relations would be sacrificed to innumerable administrative delays. Labor unions most frequently seek redress before the Board because of unfair labor practices of employers. The Congress no doubt meant to afford them expeditious hearings and relief not to be delayed by such cumbersome and delaying procedure as would be necessary if the Board itself had to review all such rulings. Such construction would put an impossible burden upon the Board. The Court has been unable to find that the *Pesante* case has been reversed or overruled.

V.

Respondent contends that the Court must determine whether or not defendant's testimony is material in the Sheboygan hearing. It was stated during the oral argument that the hearing had been going on for a considerable length of time. At one time it was stated that the matter was about to go into the fiftieth hearing and at that time

covered about eight thousand pages of transcript. This statement of counsel is not evidence or before the Court in affidavit form. In testing whether it was intended that the Court determine whether the testimony would "relate to" or "touch on" any matter under investigation by the Board, the Court can consider that it is common knowledge that these hearings sometimes go on for weeks and even months with many, many witnesses and thousands of pages of testimony. The Board and its trial exam-
42 iner have the advantage of having seen and heard the many witnesses and of having first hand knowledge of the issues and controversies.

This Court believes that had it been intended that the Court itself pass upon these criteria de novo, provision would have been made that a transcript of testimony at least be furnished to the Court together with such other parts of the record as to enable the Court to intelligently pass on that question. One would be loath to assume that the Congress meant any such cumbersome procedure. The findings and orders of the Board are subject to judicial review in the Courts of Appeal. Any error could no doubt be reached in the regular process of review. To have the Court pass upon these criteria during the pendency of the hearing before the Board would be as illogical as it would be to have a trial court stop in the middle of a trial, have the record transcribed and sent to the appellate court to review a ruling on evidence or on a procedural question. In the absence of a clear and strong showing that the evidence does not meet the criteria, it is the opinion of the Court that it should not try to review that ruling, having no copy of the record. There should be no presumption of error in the ruling. There is no showing in this record in that respect such as to move the Court to substitute its judgment on the question for the judgment of the Board

or its examiner who has seen and heard the witnesses and is thoroughly familiar with the record. As stated by the United States Supreme Court in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501:

> "The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration. * * * The consequence of the action of the District Court was to disable the Secretary from rendering a complete decision on the alleged violation as Congress had directed her to do. * * * Congress sought to have the procurement officers advised by the experience and discretion of the Secretary rather than the District Court. To perform her function she must draw inferences and make findings from the same conflicting materials that the District Court considered in anticipating and foreclosing her conclusions."

In *Cudahy Packing Co.* v. *N. L. R. B.,* 117 F. 2d 692 (CCA 10) it is stated:

> "When an application is filed with a District Court for an order requiring obedience to a subpoena it may inquire only to ascertain that a proceeding is pending before the Board of which it has jurisdiction and that the evidence sought relates to or touches the matter under investigation. If these facts are found to exist, it is the duty of the court to order obedience to the subpoena.
>
> 43 "The only defenses that respondent may assert in such a proceeding are that the proceeding in which the evidence is sought is not one of which the Board has jurisdiction or that the evidence does not

relate to or touch the matter under consideration. It may not in such a proceeding assert its defenses in the principal case."

VI

Defendant contends that the subpoena is oppressive and enforcement of it would create undue hardship for him upon the ground (a) that the defendant needs to be on his job and will be deprived of income, and (b) that the defendant would have to travel a long distance.

With reference to ground (a) the record is silent as to what the respondent's employment is, what his income is from that employment, as to whether he is a key man in any organization whose absence would disrupt a plant and throw many people out of work, or cause an unusual hardship of any kind. This record merely is to the effect that the defendant has some kind of work, apparently in Detroit. Any time any witness is served with a subpoena and compelled to attend as a witness at a trial in court or a hearing before any administrative agency, federal or state, he must leave his job, and if his job pays more than the witness fee, be deprived of that much of his income. If such were a sound basis for suppressing or refusing to enforce a subpoena, no judicial or administrative proceedings of any kind could be had.

As to its being oppressive to require the defendant "to travel a long distance" it must again be remembered that the Congress in the provisions of this Act making the subpoena effective anywhere in the United States or any territory thereof used very plain language. Michigan is one of four states immediately contiguous to Wisconsin. The distance from Detroit, Michigan, to Sheboygan, Wisconsin, is indeed mild compared with the distances implied in the language of the Congress making the subpoena effective anywhere in the United States. If the

subpoena were not to be effective in an adjoining state, the Congress used most inappropriate language. The Congress evidently felt that the functions of the Board were important enough so that its subpoenas are given much greater territorial validity than the subpoenas of the various District Courts in the ordinary proceedings before them. The Congress could have, but did not, provide that where witnesses resided more than a specified distance from the place of hearing they could not be compelled to attend but that a deposition be substituted for personal attendance.

44 VII

Respondent claims that enforcement of the subpoena would be oppressive or unreasonable because he claims that he could not have a fair trial in Sheboygan.

Section 261.08 of the Wisconsin Statutes provides that a defendant may move to have another judge brought in to hear his case because of the prejudice of the sitting judge. That statute is extremely broad. Under the provisions of Section 261.08 of the Wisconsin Statutes, if the defendant files an affidavit that he has good reason to and does believe that he cannot have a fair trial on account of the prejudice of the judge, the judge becomes disqualified. There is not even the requirement that the party set forth in affidavit form the basis of his belief.

So far as any claim that a fair trial could not be had in Sheboygan County, Section 356.03 of the Wisconsin Statutes provides that if a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue to an adjoining county. In addition to those safeguards, the history of the Supreme Court of the State of Wisconsin indicates that it has been very zealous in requiring that

defendants charged with crimes have fair trials. Practically all courts in this country have now become exceedingly aware of the jealousy with which the United States Supreme Court requires that defendants' rights be protected and that defendants in criminal cases have fair trials. This Court does not believe, cannot assume and is not in a position to hold that the state courts would ignore defendant's right to a fair trial. There is nothing in the record to justify any such assumption. The trial examiner of the National Labor Relations Board has apparently been holding hearings in Sheboygan for some time. No doubt had he been aware of any prejudice, that would be indicated by the record. If any of the parties had any concrete evidence one way or the other of any such community prejudice, no doubt it would have been put before the Court.

## VIII

Respondent contends that the enforcement of the subpoena would deny him his rights as a citizen of Michigan and interfere with the prerogatives of the Governor of Michigan. No authority is filed in support of these contentions. The respondent is presumed to be innocent of any crime of which he is charged and presumably if
45 he stands trial will receive a fair trial and not be found guilty unless proven guilty beyond a reasonable doubt. We know of no authority in the Constitution or by any Act of Congress or by any law of the state of Michigan which provides that a citizen of Michigan, while in the state of Michigan, is immune from facing trial on a criminal charge in any other state in the union. On the contrary, Article IV, Section (2) of the Constitution reads as follows so far as is material here:

> "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found

> in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

The enforcement of a subpoena has nothing to do with the extradition proceedings. The Constitution does not guarantee any right of asylum to any person to avoid having to stand trial if regularly indicted or charged with a felony in another state.

In *Mahon* v. *Justice*, 127 U. S. 700, a fugitive from Kentucky was illegally and forceably brought back from West Virginia into Kentucky. He claimed that his constitutional rights and the laws of the United States had been violated by his arrest and imprisonment in this manner. The court did not sustain that contention. There is nothing in the Act under consideration which would grant an exception to the power of subpoena on account of the fact that the witness is under indictment or charged with a crime in the state which the subpoena would require him to enter. One would be most loath to believe that the Congress ever so intended. Such intention would be so contrary to the constitutional provision above stated that it should not be lightly indulged in. As stated in *Downing* v. *Schmidt*, 4 F. Supp. 1:

> "* * * the duty of the Governor, when a requisition is presented, is ministerial and not discretionary, and is described as imperative, though, in the absence of state statute, there is no power to compel the executive to act."

See also *Kentucky* v. *Dennison*, 24 How. 66, 106-107.

## IX

The final contentions of the respondent are that he is a defendant in a criminal proceedings and is thus immune from civil process, and that he is in the custody of the state of Michigan.

46 No authority has been cited to the effect that a defendant in a situation such as is presented by this case is immune from service of a Federal subpoena. The Court has been unable to find any.

In 24 Am. Jur., Process, Sec. 138, the following language is found:

> "* * * A person in custody on a criminal charge, whether before or after conviction, may be served with civil process."

Furthermore, it would seem that witnesses do not fall within the ordinary exemptions from civil process granted to parties.

> "While many persons and classes of persons are at certain times privileged and exempted from service of civil process, these privileges and the exemption from process do not ordinarily extend to exempt such persons from being compelled to attend and testify as witnesses in a trial." 58 Am. Jur., Witnesses, Sec. 15.

The last part of this contention is that the respondent is in the custody of the State of Michigan. No authority has been cited for the proposition that the fact that he has put up bond, no copy of which and the exact terms of which are not set forth in the record, for his appearance in Michigan in a Michigan court to answer the extradition proceedings to extradite him to Wisconsin makes him immune from the service of a subpoena or takes him out of the application of the Labor Relations Act. There is

nothing in the Act to make an exception excepting such a person from service of subpoenas. One can only assume from this record that the sole purpose of the bond in Michigan is that he will respond to the extradition proceedings if extradited. If he comes into the state of Wisconsin and is served with a criminal process here, the extradition proceedings would become moot. Its only object can be to try and compel his coming into Wisconsin to stand trial for whatever offense he is charged with if extradited. Nothing in the Act provides that the Governor of any state or the state court of any state can give any citizen of any state immunity from the lawful service of a subpoena by a body having the right under the laws of Congress to subpoena such a person as a witness. The Court requested all counsel to furnish authority on this contention. No authority has been found supporting such contention. None has been found by the Court. Respondent's counsel cited some decisions, none of which support this contention in the Court's opinion.

47 Counsel for the National Labor Relations Board is directed to prepare a proposed order in accord with this decision, sending copies of the proposed order to counsel for the other parties. Such counsel will have three (3) days in which to file any objection they may have as to the form of the proposed order.

Dated, Milwaukee, Wisconsin, this 21st day of November, 1955.

K. P. Grubb,
*U. S. District Judge.*

## Appendix B

29 U.S.C. § 161. Investigatory powers of Board.

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

*Documentary evidence; summoning witnesses and taking testimony*

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent, or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Ter-

ry or possession thereof, at any designated place of ring.

*rt aid in compelling production of evidence and attendance of witnesses*

2) In case of contumacy or refusal to obey a subpena ed to any person, any district court of the United States he United States courts of any Territory or possession, he District Court of the United States for the District Columbia, within the jurisdiction of which the inquiry arried on or within the jurisdiction of which said person ty of contumacy or refusal to obey is found or resides ransacts business, upon application by the Board shall e jurisdiction to issue to such person an order requir- such person to appear before the Board its member, nt, or agency, there to produce evidence if so ordered, here to give testimony touching the matter under inves- tion or in question; and any failure to obey such order he court may be punished by said court as a contempt reof.

• • • • •

*Process, where served*

5) All process of any court to which application may be le under this subchapter may be served in the judicial rict wherein the defendant or other person required e served resides or may be found.

No. 77. GUNACA *v.* NATIONAL LABOR RELATIONS BOARD EX REL. KOHLER COMPANY. Certiorari, 351 U. S. 981, to the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* Upon suggestion of mootness by all the parties, the judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the cause as moot. *Joseph L. Rauh, Jr., Daniel H. Pollitt, John Silard* and

*Harold A. Cranefield* for petitioner. *Solicitor General Rankin* and *Jerome D. Fenton* for the National Labor Relations Board. *Jerome Powell* for the Kohler Company, respondent. Reported below: 230 F. 2d 542.